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No. 2543

United States
Circuit Court of Appeals

For the Ninth Circuit.

SPRING VALLEY WATER COMPANY, a Corporation,

Appellant,

vs.

CITY AND COUNTY OF SAN FRANCISCO,
a Municipal Corporation, and TAX COLLECTOR of Said City and County,

Appellees.

Transcript of Record.

Upon Appeal from the United States District Court for the
Northern District of California, Second Division.

Filed

JAN 28 1915

F. D. Monckton,
Clerk.

United States
Circuit Court of Appeals
For the Ninth Circuit.

SPRING VALLEY WATER COMPANY, a Corporation,

Appellant,

vs.

CITY AND COUNTY OF SAN FRANCISCO,
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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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*In the District Court of the United States, Northern
District of California, Second Division.*

. Nos. 14,735—14,892—15,131—15,569—15,344—26.

Division No. 2.

SPRING VALLEY WATER COMPANY, a Cor-
poration,

Plaintiff,

vs.

CITY AND COUNTY OF SAN FRANCISCO, et al.,
Defendants.

**Notice of Motion [for Order Directing Payment of
Taxes, etc.].**

To SPRING VALLEY WATER COMPANY a
Corporation, and McCUTCHEON, OLNEY and
WILLARD, its Attorneys:

To the Crocker National Bank of San Francisco;
to the First National Bank of San Francisco; to the
Anglo & London Paris Bank of San Francisco; to the
Union Trust Company of San Francisco; to the Mer-
cantile National Bank of San Francisco; to the Bank
of California National Association of San Francisco;
to the Wells Fargo Nevada Bank of San Francisco;

You, and each of you will please take notice that
on Monday the 30th day of November, 1914, in the
above-entitled Court and division, before the Hon.
WILLIAM C. VAN FLEET, Judge presiding
therein, at the hour of 10 o'clock A. M. or as soon
thereafter as counsel can be heard, the undersigned
will apply for an order in the above-entitled court
directing the [1*] payment of the taxes levied and

*Page-number appearing at foot of page of original certified Record.

assessed against the above-named banks as receivers and depositories of moneys in litigation in the above-entitled actions.

Said motion will be based upon this notice, upon the tax bills heretofore rendered, and upon the grounds that said taxes are due, have not been paid and that Monday the 30th day of November is the last day permitted by law for the payment of said taxes with the addition of penalties.

PERCY V. LONG,

City Attorney,

Attorney for Tax Collector.

[Endorsed]: Filed November 30, 1914, Walter B. Maling, Clerk. [2]

*In the District Court of the United States, Northern
District of California, Second Division.*

Nos. 14,275 — 14,735, — 14,892 — 15,131 — 15,569
—15,344—26.

SPRING VALLEY WATER COMPANY, a Corporation,

Complainant,

vs.

CITY AND COUNTY OF SAN FRANCISCO et al.,
Defendants.

Stipulation as to Facts.

For the purposes of the determination of the application of the city attorney of the city and county of San Francisco, State of California, as attorney for the tax collector of said city and county, notice of

which was given on or about the 28th day of November, 1914, for an order of the above-entitled court directing the payment of the taxes levied and assessed against certain named banks as receivers and depositories of moneys in litigation in the above-entitled actions, complainant and defendants in the above-entitled actions, and the said city attorney as attorney for the said tax collector, hereby stipulate and agree that the following are the material facts in the determination of said application [3] and that said application may be heard and determined thereon:

On June 22, 1908, Spring Valley Water Company, a corporation, filed a bill of complaint in equity, No. 14,735, in what was then the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California, against the City and County of San Francisco, a municipal corporation, and the board of supervisors of said city and county.

The bill alleged that the complainant was engaged in the business of supplying the city and county of San Francisco and its inhabitants with water; that on June 15, 1908, the said board of supervisors passed a certain bill or ordinance, fixing the maximum rates to be charged for furnishing water to the city and county of San Francisco and its inhabitants for the fiscal year commencing July 1, 1908, and threatened to enforce the same against the complainant. The complainant further alleged that said bill or ordinance, and the rates fixed thereby, were wholly void, null, grossly unjust, unreasonable, fraudulent and unconstitutional under the provisions of the Con-

stitution of the United States, and were oppressive and confiscatory, and did not permit of or provide for a just or reasonable or fair compensation for the water to be supplied during the said year by complainant to the said city and county and its inhabitants. The Court was asked to enjoin the defendants and all consumers of water in said city and county, both pending the litigation and perpetually at its conclusion, from enforcing against the complainant the said bill or ordinance or the rates fixed therein.

On October 7, 1908, the circuit court directed that the preliminary injunction issue and, as certain of the conditions thereof, provided as follows: [4]

“2. All compensation collected while said injunction remains in force in excess of the rates specified in said ordinance, that is, the difference between the charge so collected and the amount which would have been collected from its customers, provided bills had been rendered therefor at the rates fixed by said ordinance, shall be paid by complainant into such bank or banks and on such terms as to interest and security as may be arranged and agreed upon by counsel with the approval of any federal judge sitting in this court. If counsel fail to agree, a depository will be named and the terms of deposit fixed by such a judge. All of the excess so collected shall be paid into such bank each month during the time this injunction remains in force and immediately after the same is collected. All moneys so collected shall be received by said bank or banks, or other selected depository, and held as a special deposit, appropriately entitled, upon which interest at a rate to be

agreed upon as hereinbefore provided shall be paid.

3. Such deposits shall be held subject to the order of this court, and shall only be paid out on checks to be drawn by a special master pursuant to such order, and countersigned by a federal judge sitting in this court.

4. As soon as possible after each such monthly deposit, said complainant shall file in this court an affidavit showing in detail the name and address of each customer, or such facts as may be sufficient to identify such customer, to whom water has been furnished, and the amount collected during such calendar month from each said customer for such water in excess of the amount which he would have paid under the rates specified in said ordinance, and the total amount deposited in such bank or banks during said month. [5]

5. In order to facilitate the return of moneys so deposited, in the event of a decision or order of this court directing such return, Southard Hoffman, clerk of this court, is hereby appointed a special master to ascertain and report as to the amounts to be paid to each individual claimant, and as to the identity of such claimant. He is thus selected as special master for the reason that the claimants of the fund will be extremely numerous, and their identity and the amount of their claims will have to be established by incessant reference to the sworn statements of complainant, which will be filed in this court, and be kept in the clerk's custody, and such reports can be most expeditiously and economically

consulted by a special master who is an officer of this court.

6. In the event complainant fails in this suit all charges so collected for water in excess of the rates specified in said ordinance shall be refunded to the person or persons from whom they were collected.

7. In the event this court shall adjudge any charge or charges for water made by complainant excessive, whether said ordinance be valid or invalid, such excess of charge, provided the same shall also be in excess of the rates fixed by said ordinance shall be returned to the person or persons from whom it was collected."

Thereafter, on October 24, 1908, said injunction was issued and has to the present time continued in force.

On December 14, 1908, pursuant to stipulation by the parties, the circuit court made the following order designating Mercantile Trust Company of San Francisco as the depository for the impounded moneys: [6]

"On stipulation of counsel for the respective parties, it is hereby ordered that, while and so long as the interlocutory injunction issued under the order made in the above-entitled cause on the 7th day of October, 1908, shall be in force, all compensation collected by complainant for water supplied to the city and county of San Francisco, or the inhabitants thereof, up to and including June 30, 1909, in excess of the rates specified in the ordinance referred to in the bill of complaint in this action shall be deposited by complainant with Mercantile Trust Company of

San Francisco in the city and county of San Francisco; and that all such moneys shall bear interest at the rate of two per cent per annum from the date of each deposit, and that the account representing such deposit shall be entitled 'Spring Valley Water Company—Special Account.' All such deposits shall be held subject to the order of the above-entitled court, and shall only be paid out on checks to be drawn by Southard Hoffman, clerk of the above-entitled court (who was by said order of October 7, 1908, appointed special master) and countersigned by a federal judge sitting in the above-entitled court."

Thereafter, similar complaints to enjoin the enforcement of the water rates for the fiscal years subsequently ensuing were filed by the Spring Valley Water Company against the city and county of San Francisco and the board of supervisors of said city and county, as follows:

No. 14,892, covering the rates for the fiscal year commencing July 1, 1909, filed June 15, 1909, in what was then the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

No. 15,131, covering the rates for the fiscal year [7] commencing July 1, 1910, filed June 27, 1910, in what was then the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

No. 15,344, covering the rates for the fiscal year commencing July 1, 1911, filed June 26, 1911, in what was then the Circuit Court of the United States,

Ninth Judicial Circuit, Northern District of California.

No. 15,569, covering the rates for the fiscal year commencing July 1, 1912, filed June 26, 1912, in the District Court of the United States, Northern District of California, Second Division.

No. 26, covering the rates for the fiscal year commencing July 1, 1913, filed June 27, 1913, in the District Court of the United States, Northern District of California, Second Division.

In case No. 14,892, a temporary restraining order was issued by the circuit court on June 15, 1909, which temporary restraining order has, to the present time, continued in force. With the exception that no special master was therein appointed, this order made the same provisions for the impounding of the moneys as did the order for the preliminary injunction in case No. 14,735, as hereinbefore set forth. No stipulation or order designating the depository for the excess moneys, as in case No. 14,735, was subsequently made, but complainant deposited said moneys from time to time with Mercantile Trust Company of San Francisco, as in case No. 14,735.

In case No. 15,131, a temporary restraining order was issued by the circuit court on June 30, 1910, which temporary restraining order has, to the present time, continued in force. With the exception that no special master was therein appointed, this order made the same provisions for the impounding of the [8] moneys as did the order for the preliminary injunction in case No. 14,735, as hereinbefore set forth. No stipulation or order designating

the depository for the excess moneys, as in case No. 14,735, was subsequently made, but complainant deposited said moneys from time to time with Mercantile Trust Company of San Francisco, as in case No. 14,735.

In case No. 15,344, a temporary restraining order was issued by the circuit court on June 29, 1911, which temporary restraining order has, to the present time, continued in force. The restraining order made no provision for the impounding of the moneys, but, on August 5, 1911, it was stipulated by the parties that the excess moneys be impounded in Mercantile Trust Company of San Francisco. Said stipulation provided as follows:

“IT IS FURTHER STIPULATED that while and so long as the restraining order issued under the order made in the above-entitled cause on the 29th day of June, 1911, shall be in force, all compensation collected by complainant for water supplied to the City and County of San Francisco, or the inhabitants thereof, up to and including June 30, 1912, in excess of the rates specified in the ordinance referred to in the bill of complaint in this action, shall be deposited by complainant with Mercantile Trust Company of San Francisco, with the understanding, and subject to the condition, that any amounts so deposited shall be repaid to complainant in case it is successful in this action. In case complainant is not successful, and the rates fixed by ordinance and set forth in the complaint herein are held to be valid, then said amounts so collected shall be returned to the person or persons entitled thereto.” [9]

On July 29, 1912, by orders of the District Court of the United States, Northern District of California, Second Division, in cases No. 14,892, 15,131 and 15,344, J. A. Schaertzer was appointed special master. Said orders were worded as follows:

“Whereas, it appears to the court that, in the above-entitled action, a certain amount of money has been deposited by complainant with Mercantile Trust Company of San Francisco, pending a determination of the questions involved in this action; and,

Whereas, said amount so deposited is to be withdrawn only on a check, or checks, drawn by a special master and signed by a special judge sitting in this court:

Now, therefore, it is hereby ordered that, in order to facilitate the return of moneys so deposited, in the event of a decision or order of this court directing such return, J. A. Schaertzer, deputy clerk of this court, is hereby appointed special master to ascertain and report as to the amounts to be paid to each individual claimant and as to the identity of such claimant. He is thus selected and appointed a special master for the reason that the claimants of the fund will be extremely numerous, and their identity and the amount of their claims will have to be established by incessant reference to the sworn statements of complainant which will be filed in this court and kept in the clerk's custody, and such reports can be most expeditiously and economically consulted by a special master who is an officer of this court.”

On the same day, by a similar order made by the same court in case No. 14,735, the said J. A. Schaertzer was appointed special master as successor to Southard Hoffman, deceased. [10]

In case No. 15,569, the district court, on July 20, 1912, ordered that a preliminary injunction issue. Said order provided as follows:

“IT IS FURTHER ORDERED, pursuant to stipulation of the parties hereto, on file herein, that all amounts collected by complainant, in the above-entitled action, in excess of the rates fixed by ordinance for the fiscal year beginning July 1, 1912, be deposited and impounded each month with Mercantile Trust Company of San Francisco, pending a determination of the questions involved in said action, and that within fifteen (15) days after each monthly deposit complainant file in this court an affidavit showing in detail the name and address of each customer, or such facts as may be sufficient to identify such customer, to whom water has been furnished, and the amount collected during said calendar month from each said customer for such water in excess of the amount which he would have paid under the rates specified in said ordinance, and the total amount deposited in said bank during said month. The amounts so deposited shall be withdrawn only on checks drawn by a special master and countersigned by a federal judge, sitting in this court.

In order to facilitate the return of moneys so deposited, in the event of a decision or order of this court directing such return, J. A. Schaertzer, deputy clerk of this court, is hereby appointed a special mas-

ter to ascertain and report as to the amounts to be paid to each individual claimant and as to the identity of such claimant. He is thus selected as special master for the reason that the claimants of the fund will be extremely numerous and their identity and the amount of their claims will have to be established by incessant reference to [11] the sworn statements of complainant which will be filed in this court and kept in the clerk's custody, and such reports can be most expeditiously and economically consulted by a special master who is an officer of this court.

Thereafter, on July 24, 1912, said injunction was issued, which injunction has, up to the present time, continued in force.

In case No. 26, a temporary restraining order was made by the district court on June 30, 1913, which temporary restraining order has, up to the present time, continued in force. Thereafter, on July 15, 1913, the district court, by an order making the same provisions in this regard as did the order for the preliminary injunction in case No. 15,569, as hereinbefore set forth, directed the money to be impounded in Mercantile Trust Company of San Francisco, and appointed J. A. Schaertzer special master.

In accordance with the stipulations and orders of court in suits No. 14,735, 14,892, 15,131, 15,344, 15,569 and 26, hereinbefore referred to, complainant, from time to time, deposited with Mercantile Trust Company of San Francisco the moneys collected by it in excess of the rates fixed by the various ordinances. Subsequently to the depositing of the moneys with Mercantile Trust Company of San Francisco in each

of the above-numbered suits, the district court, from time to time, ordered a portion of the moneys so deposited in each of said suits to be transferred to certain of the following named institutions, to wit: Wells Fargo Nevada National Bank of San Francisco, The Crocker National Bank of San Francisco, The Bank of California National Association, Union Trust Company of San Francisco, The First National Bank of San Francisco, and The Anglo and London Paris National Bank. Said orders were worded as follows: [12]

“Whereas, the amount of money deposited with the Mercantile Trust Company of San Francisco, in this cause and others between the same parties, is greater than, in the opinion of the court, should be deposited with a single depository:

Now, in consideration of the premises, it is ordered that, of the moneys so deposited with said Mercantile Trust Company of San Francisco in the above-entitled cause (amounting in the aggregate to the sum of ———— dollars, besides interest), there shall be deposited the sum of ———— dollars, with each of the following named institutions, to wit, ————, each of which has heretofore been designated by this court as a depository in bankruptcy proceedings, and each of which is hereby appointed a depository for the purposes of this order.

In order that said Mercantile Trust Company of San Francisco shall not be inconvenienced by having all said moneys withdrawn at one time, it is hereby ordered that ———— dollars of said sum shall be deposited with each of said depositories, herein

named, on the —— day of ——, and that —— dollars shall be deposited with each of said depositaries on the —— day of ——, and J. A. Schaertzer, heretofore appointed special master in this cause, is directed to draw checks upon and against said Mercantile Trust Company of San Francisco and in favor of the depositaries herein named, for the amounts so directed to be deposited, and to present said checks to a federal judge, sitting in this court, for countersignature.

And it is further ordered that the said moneys, so to be deposited, shall be taken and accepted as a special deposit by each of said depositaries, herein named, and shall, with interest [13] at two (2) per cent. per annum, compounded monthly (which is the rate of interest now paid by said Mercantile Trust Company of San Francisco on the moneys so deposited with it), from the date of receipt by the depositary of each installment to the date of payment, be credited to the Spring Valley Water Company, but shall be held subject to the order of this court in this cause, and shall only be paid out on checks to be drawn by J. A. Schaertzer, heretofore appointed special master in this cause, and countersigned by a federal judge, sitting in this court."

On the first Monday in March, 1913, the amounts of moneys on deposit with the various banks in suits No. 14,735, 14,892, 15,131, 15,344 and 15,569, pursuant to the stipulations and orders hereinbefore set forth, were as follows:

WELLS FARGO NEVADA NATIONAL BANK
OF SAN FRANCISCO:

Suit No. 14,735	\$20,080.08	
Suit No. 14,892	20,080.08	
Suit No. 15,131	20,080.08	
Suit No. 15,344	20,080.08	
Suit No. 15,569	20,080.08	\$100,400.00

THE CROCKER NATIONAL BANK OF SAN
FRANCISCO:

Suit No. 14,735	\$20,081.20	
Suit No. 14,892	20,081.20	
Suit No. 15,131	20,081.20	
Suit No. 15,344	20,081.20	
Suit No. 15,569	20,081.20	\$100,406.00

[14]

THE BANK OF CALIFORNIA NATIONAL
ASSOCIATION:

Suit No. 14,735	\$25,249.67	
Suit No. 14,892	50,499.31	
Suit No. 15,131	63,124.15	
Suit No. 15,344	63,124.15	\$201,997.28

UNION TRUST COMPANY OF SAN FRAN-
CISCO:

Suit No. 14,735	\$25,250.97	
Suit No. 14,892	50,501.98	
Suit No. 15,131	63,127.50	
Suit No. 15,344	63,127.50	\$202,007.95

THE FIRST NATIONAL BANK OF SAN FRANCISCO:

Suit No. 14,735	\$25,251.04	
Suit No. 14,892	50,502.10	
Suit No. 15,131	63,127.66	
Suit No. 15,344	63,127.66	\$202,008.46

THE ANGLO AND LONDON PARIS NATIONAL BANK:

Suit No. 14,735	\$25,253.84	
Suit No. 14,892	50,507.70	
Suit No. 15,131	63,134.63	
Suit No. 15,344	63,134.63	\$202,030.80

MERCANTILE TRUST COMPANY OF SAN FRANCISCO:

Suit No. 14,735	\$45,885.29	
Suit No. 14,892	75,525.07	
Suit No. 15,131	36,178.59	
Suit No. 15,344	48,966.30	
Suit No. 15,569	163,907.96	\$370,463.21

[15]

On the first Monday in March, 1914, the amounts of moneys on deposit with the various banks in suits No. 14,735, 14,892, 15,131, 15,344, 15,569 and 26, pursuant to the stipulations and orders hereinbefore set forth, were as follows:

WELLS FARGO NEVADA NATIONAL BANK
OF SAN FRANCISCO:

Suit No. 14,735	\$20,490.92	
Suit No. 14,892	40,579.93	
Suit No. 15,131	20,490.92	
Suit No. 15,344	20,490.92	
Suit No. 15,569	65,691.18	
Suit No. 26	25,111.25	\$192,855.12

THE CROCKER NATIONAL BANK OF SAN
FRANCISCO:

Suit No. 14,735	\$20,492.19	
Suit No. 14,892	40,582.43	
Suit No. 15,131	20,492.19	
Suit No. 15,344	20,492.19	
Suit No. 15,569	65,694.97	
Suit No. 26	25,112.66	\$192,866.63

THE BANK OF CALIFORNIA NATIONAL
ASSOCIATION:

Suit No. 14,735	\$40,832.35	
Suit No. 14,892	51,532.85	
Suit No. 15,131	64,416.09	
Suit No. 15,344	64,416.09	
Suit No. 15,569	45,197.76	
Suit No. 26	25,109.89	\$291,505.03

UNION TRUST COMPANY OF SAN FRANCISCO:

Suit No. 14,735	\$25,767.65	
Suit No. 14,892	51,535.45	
Suit No. 15,131	64,419.33	
Suit No. 15,344	79,537.48	
Suit No. 15,569	45,153.89	\$266,413.80

THE FIRST NATIONAL BANK OF SAN FRANCISCO:

Suit No. 14,735	\$40,834.55	
Suit No. 14,892	51,535.64	
Suit No. 15,131	64,419.59	
Suit No. 15,344	64,419.59	
Suit No. 15,569	45,200.27	\$266,409.64

THE ANGLO AND LONDON PARIS NATIONAL BANK:

Suit No. 14,735	\$25,770.68	
Suit No. 14,892	51,541.44	
Suit No. 15,131	64,426.78	
Suit No. 15,344	79,495.22	
Suit No. 15,569	45,207.81	\$266,441.93

MERCANTILE TRUST COMPANY OF SAN FRANCISCO:

Suit No. 14,735	\$16,695.64	
Suit No. 14,892	36,899.07	
Suit No. 15,131	36,918.82	
Suit No. 15,344	19,839.71	
Suit No. 15,569	44,073.35	
Suit No. 26	140,900.53	\$295,327.12

There has been assessed to the Wells Fargo Nevada National Bank of San Francisco on the assessment-roll of the city and county of San Francisco, State of California, for the fiscal year 1914-1915, in volume entitled "Vol. 16 W. X. Y. Z. Unsecured Personal Property 1914" at page 42 of said volume, in the manner hereinafter set forth the sum of \$100,400.00. In the said assessment the Wells Fargo Nevada National Bank of San Francisco is described as "Receiver of Impounded Moneys," and is further described as "Receiver or depository under order of court of the impounded moneys in Equity Suits Numbered 14,275-14,735-14,892-15,131-15,569-15,344-26, District Court of the United States wherein the Spring Valley Water Company is plaintiff and city and county of San Francisco et al., defendants." There is added to the last mentioned designation the words "(Assessment for the year 1913)." On the said assessment there are the further words, "Escaped assessment for the year 1913."

The said property has been assessed on the said assessment-roll on the said valuation above mentioned, and taxes have been levied thereon for said fiscal year at the rate of \$2,289 on each \$100 of said valuation, the said taxes computed at the said rate amounting to the sum of \$2,298.16.

There has been further assessed to the Wells Fargo Nevada National Bank of San Francisco on the said assessment-roll, in the manner hereinafter set forth, the sum of \$192,855.00. In the said assessment the Wells Fargo Nevada National Bank of San Francisco is described as "Receiver of Impounded

Moneys," and is further described as "Receiver or depository under order of Court of the impounded moneys in Equity Suits Numbered 14,275—14,735—14,892—15,131—15,569—15,344—26, District Court of the United States, wherein the Spring Valley Water Company is plaintiff and [18] City and County of San Francisco et al., defendants. The said property has been assessed on the said assessment-roll on the said valuation above mentioned, and taxes have been levied thereon for said fiscal year at the rate of \$2,289 on each \$100 of said valuation, the said taxes computed at the said rate amounting to the sum of \$4,414.45.

There has been assessed to The Crocker National Bank of San Francisco on the assessment-roll of the City and County of San Francisco, State of California, for the fiscal year 1914—1915, in volume entitled "Vol. 3C Unsecured Personal Property 1914" at page 96 of said volume, in the manner hereinafter set forth the sum of \$100,406.00. In the said assessment The Crocker National Bank of San Francisco is described as "Receiver of Impounded Moneys," and is further described as "Receiver or depository under order of Court of the Impounded moneys in Equity Suits Numbered 14,275—14,735—14,892—15,131—15,569—15,344—26, District Court of the United States, wherein the Spring Valley Water Company is plaintiff and City and County of San Francisco et al., defendants." There is added to the last mentioned designation the words "(Assessment for the year 1913)." On the said assessment there

are the further words "Escaped assessment for the year 1913."

The said property has been assessed on the said assessment-roll on the said valuation above mentioned, and taxes have been levied thereon for said fiscal year at the rate of \$2,289 on each \$100 of said valuation, the said taxes computed at the said rate amounting to the sum of \$2,298.29.

There has been further assessed to The Crocker National Bank of San Francisco on the said assessment-roll, in the manner hereinafter set forth, the sum of \$192,866.00. In the said [19] assessment The Crocker National Bank of San Francisco is described as "Receiver of Impounded Moneys," and is further described as "Receiver or depository under order of Court of the impounded moneys in Equity Suits Numbered 14,275—14,735—14,892—15,131—15,569—15,344—26, District Court of the United States, wherein the Spring Valley Water Company is plaintiff and City and County of San Francisco et al., defendants." The said property has been assessed on the said assesment-roll on the said valuation above mentioned, and taxes have been levied thereon for said fiscal year at the rate of \$2,289 on each \$100 of said valuation, the said taxes computed at the said rate amounting to the sum of \$4,414.70.

There has been assessed to The Bank of California National Association on the assessment-roll of the city and county of San Francisco, State of California, for the fiscal year 1914—1915, in volume entitled "Vol. 2B Unsecured Personal Property 1914" at

page 16 of said volume, in the manner hereinafter set forth the sum of \$201,997.00. In the said assessment The Bank of California National Association is described as "Receiver of Impounded Moneys," and is further described as "Receiver or depository under order of court of the impounded moneys in Equity Suits numbered 14,275—14,735—14,892—15,131—15,569—15,344—26, District Court of the United States, wherein the Spring Valley Water Company is plaintiff and City and County of San Francisco et al., defendants." There is added to the last-mentioned designation the words "(Assessment for the year 1913)." On the said assessment there are the further words "Escaped assessment for the year 1913."

The said property has been assessed on the said assessment-roll on the said valuation above mentioned, and taxes have been [20] levied thereon for said fiscal year at the rate of \$2.289 on each \$100 of said valuation, the said taxes computed at the said rate amounting to the sum of \$4,623.71.

There has been further assessed to The Bank of California National Association on the said assessment-roll, in the manner hereinafter set forth, the sum of \$291,505.00. In the said assessment The Bank of California National Association is described as "Receiver of Impounded Moneys," and is further described as "Receiver or depository under order of court of the impounded moneys in Equity Suits Numbered 14,275—14,735—14,892—15,131—15,569—15,344—26, District Court of the United States, wherein the Spring Valley Water Company is plaintiff and City and County of San Francisco et al., Defendants."

The said property has been assessed on the said assessment-roll on the said valuation above mentioned, and taxes have been levied thereon for said fiscal year at the rate of \$2.289 on each \$100 of said valuation, the said taxes computed at the said rate amounting to the sum of \$6672.55.

There has been assessed to the Union Trust Company of San Francisco on the assessment-roll of the city and county of San Francisco, State of California, for the fiscal year 1914-1915, in volume entitled "Vol. 15 T. U. V. Unsecured Personal Property 1914" at page 90 of said volume, in the manner hereinafter set forth the sum of \$202,007.00. In the said assessment the Union Trust Company of San Francisco is described as "Receiver of Impounded Moneys," and is further described as "Receiver or depository under order of court of the impounded moneys in Equity Suits numbered 14,275-14,735-14,892-15,131-15,569-15,344-26, District Court of the United States, wherein the Spring Valley Water Company is plaintiff and City and County of San [21] Francisco et al., defendants." There is added to the last mentioned designation the words "(Assessment for the year 1913)." On the said assessment there are the further words, "Escaped assessment for the year 1913."

The said property has been assessed on the said assessment-roll on the said valuation above mentioned, and taxes have been levied thereon for said fiscal year at the rate of \$2.289 on each \$100 of said valuation, the said taxes computed at the said rate amounting to the sum of \$4,623.94.

There has been further assessed to the Union Trust Company of San Francisco on the said assessment-roll, in the manner hereinafter set forth, the sum of \$266,413.00. In the said assessment the Union Trust Company of San Francisco is described as "Receiver of Impounded Moneys," and is further described as "Receiver or depository under order of court of the impounded moneys in Equity Suits Numbered 14,275—14,735—14,892—15,131—15,569—15,344—26, District Court of the United States, wherein the Spring Valley Water Company is plaintiff and City and County of San Francisco et al., defendants." The said property has been assessed on the said assessment-roll on the said valuation above mentioned, and taxes have been levied thereon for said fiscal year at the rate of \$2.289 on each \$100 of said valuation, the said taxes computed at the said rate amounting to the sum of \$6,098.20.

There has been assessed to The First National Bank of San Francisco on the assessment-roll of the city and county of San Francisco, State of California, for the fiscal year 1914-1915, in volume entitled "Vol. 5 E. F. Unsecured Personal Property 1914" at page 114 of said volume, in the manner hereinafter set forth the sum of \$202,008.00. In the said assessment The [22] First National Bank of San Francisco is described as "Receiver of Impounded Moneys," and is further described as "Receiver or depository under order of court of the impounded moneys in Equity Suits Numbered 14,275—14,735—14,892—15,131—15,569—15,344—26, District Court of the United States, wherein the Spring Valley

Water Company is plaintiff and City and County of San Francisco et al., defendants.” There is added to the last mentioned designation the words “(Assessment for the year 1913).” On the said assessment there are the further words, “Escaped assessment for the year 1913.”

The said property has been assessed on the said assessment-roll on the said valuation above mentioned, and taxes have been levied thereon for said fiscal year at the rate of \$2.289 on each \$100 of said valuation, the said taxes computed at the said rate amounting to the sum of \$4,623.96.

There has been further assessed to The First National Bank of San Francisco on the said assessment-roll, in the manner hereinafter set forth, the sum of \$266,409.00. In the said assessment The First National Bank of San Francisco is described as “Receiver of Impounded Moneys,” and is further described as “Receiver or depository under order of court of the impounded moneys in Equity Suits Numbered 14,275—14,735—14,892—15,131—15,569—15,344—26, District Court of the United States, wherein the Spring Valley Water Company is plaintiff and City and County of San Francisco et al., defendants.” The said property has been assessed on the said assessment-roll on the said valuation above mentioned, and taxes have been levied thereon for said fiscal year at the rate of \$2,289 on each \$100 of said valuation, the said taxes computed at the said rate amounting to the sum of \$6,098.11. [23]

There has been assessed to The Anglo and London Paris National Bank on the assessment-roll of the

city and county of San Francisco, State of California, for the fiscal year 1914-1915, in volume entitled "Vol. 1A Unsecured Personal Property 1914" at page 59 of said volume, in the manner hereinafter set forth the sum of \$202,030.00. In the said assessment The Anglo and London Paris National Bank is described as "Receiver of Impounded Moneys," and is further described as "Receiver or depository under order of court of the impounded moneys in Equity Suits Numbered 14,275-14,735-14,892-15,131-15,569-15,344-26, District Court of the United States, wherein the Spring Valley Water Company is plaintiff and City and County of San Francisco et al., defendants." There is added to the last mentioned designation the words "(Assessment for the year 1913)." On the said assessment there are the further words, "Escaped assessment for the year 1913."

The said property has been assessed on the said assessment-roll on the said valuation above mentioned, and taxes have been levied thereon for said fiscal year at the rate of \$2.289 on each \$100 of said valuation, the said taxes computed at the said rate amounting to the sum of \$4,624.47.

There has been further assessed to The Anglo and London Paris National Bank on the said assessment-roll, in the manner hereinafter set forth, the sum of \$266,441.00. In the said assessment The Anglo and London Paris National Bank is described as "Receiver of Impounded Moneys," and is further described as "Receiver or depository under order of court of the impounded moneys in Equity Suits Num-

bered 14,275—14,735—14,892—15,131—15,569—15,344—26, District Court of the United States, wherein the Spring Valley Water Company is plaintiff and City and County of San [24] Francisco et al., defendants.” The said property has been assessed on the said assessment-roll on the said valuation above mentioned, and taxes have been levied thereon for said fiscal year at the rate of \$2,289 on each \$100 of said valuation, the said taxes computed at the said rate amounting to the sum of \$6,098.84.

There has been assessed to Mercantile Trust Company of San Francisco on the assessment-roll of the City and County of San Francisco, State of California, for the fiscal year 1914-1915, in volume entitled “Vol. 10M Unsecured Personal Property 1914,” at page 56 of said volume, in the manner hereinafter set forth the sum of \$370,463. In the said assessment, Mercantile Trust Company of San Francisco is described as “Receiver of Impounded Moneys,” and is further described as “Receiver or depository under order of court of the impounded moneys in Equity Suits Numbered 14,275—14,735—14,829—15,131—15,569—15,344—26, District Court of the United States, wherein the Spring Valley Water Company is plaintiff and City and County of San Francisco et al., defendants.” There is added to the last mentioned, and taxes have been levied thereon for the said fiscal year at the rate of \$2.289 on each \$100 of said valuation, the said taxes computed at the said rate amounting to the sum of \$8,479.89.

There has been further assessed to Mercantile Trust Company of San Francisco on the said assess-

ment-roll, in the manner hereinafter set forth, the sum of \$295,327. In the said assessment Mercantile Trust Company of San Francisco is described as [25] "Receiver of Impounded Moneys," and is further described as "Receiver or depository under order of court of the impounded moneys in Equity Suits Numbered 14,275—14,735—14,892—15,131—15,569—15,344—26, District Court of the United States, wherein the Spring Valley Water Company is plaintiff and City and County of San Francisco et al., defendants." The said property has been assessed on the said assessment-roll on the said valuation above mentioned, and taxes have been levied thereon for said fiscal year at the rate of \$2.289 on each \$100 of said valuation, the said taxes computed at the said rate amounting to the sum of \$6,760.04.

The last two assessments, to wit, those against Mercantile Trust Company of San Francisco, were originally assessed to Mercantile National Bank of San Francisco, owing to an erroneous return made by the latter institution. The said assessments were corrected by the assessor on the assessment-rolls subsequently to the making of the aforesaid application for an order of court, so that said assessment-rolls now show said moneys to be assessed to Mercantile Trust Company of San Francisco.

Suit No. 14,275, referred to in each of the foregoing assessments, is an action similar to those hereinbefore set forth, and was commenced in the United States Circuit Court, Ninth Judicial Circuit, Northern District of California, by Spring Valley Water Company against the City and County of San Fran-

cisco and the Board of Supervisors of said city and county, in June, 1907. No moneys, however, were impounded in said suit, either by stipulation of the parties, order of court, or otherwise, and none of the above-mentioned banks were in possession of any moneys deposited in said suit, either on the first Monday in March, 1913, or on the first Monday in March, 1914. [26]

Suit No. 26, referred to in each of the foregoing assessments, was, as has been hereinbefore set forth, commenced on the 27th day of June, 1913, and, on the first Monday in March, 1913, none of the above-mentioned banks were in possession of any moneys deposited in said suit.

In suit No. 15,569, referred to in each of the foregoing assessments, no moneys were on deposit on the first Monday in March, 1913, with any of the following named banks: The Bank of California National Association, The Anglo and London Paris National Bank, The First National Bank of San Francisco, and Union Trust Company of San Francisco.

In Suit No. 26, referred to in each of the foregoing assessments, no moneys were on deposit on the first Monday in March, 1914, either with The Anglo and London Paris National Bank or Union Trust Company of San Francisco.

In each of the foregoing assessments no separate assessment was made of any moneys alleged to be impounded in any specified suit, but the assessment was made of all impounded moneys on deposit with each of said banks in all of the above named suits.

In none of the suits hereinbefore referred to have

any moneys been deposited with Mercantile National Bank of San Francisco.

In none of the suits hereinbefore referred to has any order appointing a receiver been made, unless the orders appointing the special master and requiring the impounding of the excess moneys in the various banks, as hereinbefore set forth, come within that category, but said banks have at all times held said moneys on deposit subject to the conditions specified in the stipulations by the parties and orders of Court, as hereinbefore set forth.

The money deposited by Spring Valley Water Company with the various banks, as hereinbefore stated, has in no instance [27] been kept as a separate or designated fund by any of said banks, but in each case has been mingled with the general funds of the bank and credited by said bank to the respective suit in connection with which it has been deposited.

Each of the above-named banks, to wit: Wells Fargo Nevada National Bank of San Francisco, The Crocker National Bank of San Francisco, The Bank of California National Association, Union Trust Company of San Francisco, The First National Bank of San Francisco, The Anglo and London Paris National Bank, Mercantile Trust Company of San Francisco, and Mercantile National Bank of San Francisco, has paid the one per cent tax assessed against it for the fiscal years 1913-1914 and 1914-

1915 under the provisions of Article XIII, Section 14, of the Constitution of California.

EDWARD J. McCUTCHEN,

Solicitors for Complainant.

McCUTCHEN, OLNEY & WILLARD

Of Counsel for Complainant.

PERCY V. LONG,

Solicitor for Defendants.

PERCY V. LONG,

City Attorney, Solicitor for Tax Collector.

[Endorsed]: Filed Dec. 29, 1914. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [28]

*In the District Court of the United States, Northern
District of California, Second Division.*

Nos. 14,735—14,892—15,131—15,569—15,344—

*15,326.

Division No. 2.

SPRING VALLEY WATER COMPANY, a Cor-
poration,

Plaintiff,

vs.

CITY AND COUNTY OF SAN FRANCISCO
et al.,

Defendants.

(Order for Payment of Taxes.)

Upon reading the affidavit of Edward F. Bryant,
Tax Collector in and for the City and County of San

*Corrected pursuant to Order signed and filed December 30, 1914, nunc
pro tunc December 1, 1914. J. A. Schaertzer, Deputy Clerk.

Francisco, and upon motion of Percy V. Long, City Attorney of the City and County of San Francisco, IT IS HEREBY ORDERED that the sum of Eight Thousand Four Hundred Seventy-nine and 89/100 (\$8,479.89) Dollars be paid out of sums deposited subject to order of this Court in the above-entitled

*Trust Company

actions in the Mercantile ~~National Bank~~, of San Francisco, to said Tax Collector, being the taxes levied in accordance with Sections 3647 and 3649 of the Political Code upon certain sums received by

*Trust Company

said Mercantile ~~National Bank~~ of San Francisco as receivers and depositaries in accordance with orders heretofore made in the above entitled matters by the above entitled court; which sums escaped assessment for the fiscal year 1913-14;

AND IT IS FURTHER ORDERED that John A. Schaertzer, Special Master in Chancery in said actions, draw his check upon said bank for the payment of said sum of Eight Thousand, Four Hundred Seventy-nine & 89/100 (\$8,479.89) Dollars, as [29] taxes out of the sums impounded and deposited in said bank as aforesaid.

Dated: December 1st, 1914.

WM. C. VAN FLEET,

Judge.

[Endorsed]: Filed Dec. 1, 1914. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [30]

*In the District Court of the United States, Northern
District of California, Second Division.*

Nos. 14,735—14,892—15,131—15,569—15,344—
15,326.

SPRING VALLEY WATER COMPANY, a Cor-
poration,

Plaintiff,

vs.

CITY AND COUNTY OF SAN FRANCISCO
et al.,

Defendants.

**(Order Nunc Pro Tunc for Order Directing Pay-
ment Taxes on Impounded Money by Mercantile
Trust Company of San Francisco.)**

WHEREAS, on the first day of December, 1914, this Court made its order directing payment by the Mercantile National Bank to E. F. Bryant, Tax Collector of the City and County of San Francisco, of the sum of Eight Thousand Four Hundred Seventy-nine and 89/100 (\$8,479.89) Dollars as taxes for the fiscal year 1914-15, on the impounded rate moneys in the above-entitled actions; and

WHEREAS, it appears that no moneys were deposited with the Mercantile National Bank in the above-entitled actions and that moneys were deposited with the Mercantile Trust Company of San Francisco in the above-entitled actions; and

WHEREAS, it now appears that the assessment of the moneys so taxed had been originally erroneously made against said Mercantile National Bank,

instead of against the Mercantile Trust Company of San Francisco, as receiver and depository, where said moneys were actually on deposit; and

WHEREAS, the said Mercantile Trust Company of San Francisco paid said taxes in compliance with the said order directed to the Mercantile National Bank, and [31]

WHEREAS, prior to receipt of said taxes by the said Tax Collector, said erroneous assessment was regularly corrected on the books by the Assessor of the City and County of San Francisco and said taxes now appear thereon to have been duly paid by the Mercantile Trust Company of San Francisco, receiver as aforesaid, and

It appearing to the Court, ~~upon stipulation of all parties concerned,~~ that said order of December 1, 1914, should be corrected to conform with said payment, in order that the same shall appear to have been made upon authorization of this Court,

NOW THEREFORE, it is hereby ORDERED that the order of this Court made the first day of December, 1914, directing the payment by the Mercantile National Bank to Edward E. Bryant, Tax Collector of the City and County of San Francisco, of the sum of Eight Thousand Four Hundred Seventy-nine and 89/100 (\$8,479.89) Dollars, taxes as aforesaid, be corrected on its face so as to order said payment to be made by the Mercantile Trust Company of San Francisco as receiver and depository of said impounded moneys; and the clerk of the Court is hereby authorized and directed to make such correction *nunc pro tunc*; and it is further ordered

that the action of the Mercantile Trust Company of San Francisco in paying said taxes be and it is hereby ratified, confirmed and approved.

Dated December 30, 1914.

WM. C. VAN FLEET,
Judge.

[Endorsed]: Filed Dec. 30, 1914, *nunc pro tunc* Dec. 1, 1914. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [32]

*In the District Court of the United States, Northern
District of California, Second Division.*

Nos. 14,735—14,892—15,131—15,569—15,344—26.

SPRING VALLEY WATER COMPANY, a Corporation,

Complainant,

vs.

CITY AND COUNTY OF SAN FRANCISCO et al.,
Defendants.

Petition for Appeal.

SPRING VALLEY WATER COMPANY, a Corporation, complainant in the above-entitled action, feeling itself aggrieved by the decision of the Court in said action and the order entered herein on the 1st day of December, 1914, wherein and whereby it was ordered that the sum of \$8,479.89 be paid to the Tax Collector of the City and County of San Francisco, State of California, out of certain sums deposited with MERCANTILE TRUST COMPANY OF SAN FRANCISCO, subject to the orders of the

above-entitled court in the above-entitled actions, and wherein and whereby it was further ordered that John A. Schaertzer, Special Master in Chancery in said actions, draw his check upon said bank for the payment of said sum of \$8,479.89, as taxes, out of the sums deposited and impounded in said bank as aforesaid; comes now, by its undersigned solicitors, and appeals from said order to the United States Circuit Court of Appeals, and prays that this, its petition for said appeal, may be allowed [33] and that a transcript of the record and proceedings and papers upon which said order was made, duly authenticated, may be sent to said United States Circuit Court of Appeals for the Ninth Circuit; and now, at the time of the filing of said petition for appeal, the said appellant files an assignment of errors setting up separately and particularly each error asserted and intended to be urged in the United States Circuit Court of Appeals for the Ninth Circuit.

Your petitioner further prays that an order be made fixing the amount of the cost bond which this appellant shall give and furnish upon said appeal.

And your petitioner will ever pray.

EDWARD J. McCUTCHEN,
A. CRAWFORD GREENE,
Solicitors for Said Complainant.

McCUTCHEN, OLNEY & WILLARD,
Of Counsel for Complainant.

[Endorsed]: Filed Dec. 30, 1914. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [34]

*In the District Court of the United States, Northern
District of California, Second Division.*

Nos. 14,735—14,892—15,131—15,569—15,344—26.

SPRING VALLEY WATER COMPANY, a Corporation,

Complainant,

vs.

CITY AND COUNTY OF SAN FRANCISCO et al.,
Defendants.

Assignment of Errors.

Now comes SPRING VALLEY WATER COMPANY, a corporation, complainant in the above-entitled actions, by its undersigned solicitors, and says that in the record, proceeding and order made and entered in these cases on the first day of December, 1914, wherein and whereby it was ordered that the sum of \$8,479.89 be paid to the Tax Collector of the City and County of San Francisco, State of California, out of certain sums deposited with Mercantile Trust Company of San Francisco, subject to the orders of the above-entitled court in the above-entitled actions, and wherein and whereby it was further ordered that John A. Schaertzer, Special Master in Chancery in said actions, draw his check upon said Mercantile Trust Company of San Francisco for the payment of said sum of \$8,479.89, as taxes, out of the sums deposited and impounded in said Mercantile Trust Company of San Francisco as aforesaid, there is manifest error, in that the said complaint has been denied its just rights by the order

entered by said district court, and the said complainant hereby assigns and sets out [35] separately and particularly the following errors, viz.:

I.

The Court erred in refusing to deny the application of the City Attorney of the City and County of San Francisco, State of California, as attorney for the Tax Collector of said city and county, for an order of the above-entitled court directing the payment of the taxes levied and assessed against the above-named Mercantile Trust Company of San Francisco as receiver and depository of moneys in litigation in the above-entitled actions.

II.

The Court erred in making its order directing that the sum of \$8,479.89 be paid to the Tax Collector of the City and County of San Francisco, State of California, out of sums deposited in Mercantile Trust Company of San Francisco, subject to the order of said court in the above-entitled actions, and in further ordering that John A. Schaertzer, Special Master in Chancery in said actions, draw his check upon said Mercantile Trust Company of San Francisco for the payment of said sum of \$8,479.89, as taxes, out of the sums deposited and impounded in said Mercantile Trust Company of San Francisco, as aforesaid.

III.

The Court erred in making said order and in holding and deciding that said taxes were assessed and levied in accordance with Sections 3647 and 3649 of the Political Code of California, or in accordance

with either of said sections.

IV.

The Court erred in making said order and in holding and deciding that said moneys, deposited in said Mercantile Trust Company of San Francisco, as aforesaid, were moneys in litigation in the possession of said Mercantile Trust Company of San Francisco as receiver. [36]

V.

The Court erred in making said order and in holding and deciding that said taxes were assessed and levied upon certain sums received by said Mercantile Trust Company of San Francisco as a receiver and depository in accordance with orders heretofore made in the above-entitled actions by the above-entitled court.

VI.

The Court erred in making said order and in holding and deciding that said taxes were validly and lawfully assessed.

VII.

The Court erred in making said order and in holding and deciding that said taxes were validly and lawfully assessed as moneys in litigation in the possession of said Mercantile Trust Company of San Francisco as receiver.

VIII.

The Court erred in making said order and in holding and deciding that said taxes were validly and lawfully assessed and levied as taxes on moneys which had escaped assessment for the fiscal year 1913-1914.

IX.

The Court erred in making said order, because it appears from the undisputed facts of the case that said assessment was originally made to Mercantile National Bank and that said assessment was changed by the assessor on the assessment-rolls subsequent to the 28th day of November, 1914, without authority of law, so that said assessment would show said moneys to be assessed to Mercantile Trust Company of San Francisco. [37]

X.

The Court erred in making said order, because it appears from the undisputed facts of the case that in none of the above-entitled actions have any moneys been deposited with Mercantile National Bank of San Francisco.

XI.

The Court erred in making said order, because it appears from the undisputed facts of the case that, in action No. 14,275, referred to in the assessment to said Mercantile Trust Company of San Francisco, no moneys were on deposit with said Mercantile Trust Company of San Francisco on the first Monday in March, 1913.

XII.

The Court erred in making said order, because it appears from the undisputed facts of the case that in action No. 26 of the above-entitled actions, referred to in the assessment to said Mercantile Trust Company of San Francisco, no moneys were on deposit with said Mercantile Trust Company of San Francisco on the first Monday in March, 1913.

XIII.

The Court erred in making said order and in directing that the sum of \$8,479.89 be paid out of sums deposited in said Mercantile Trust Company of San Francisco in the above-entitled actions and in not directing or specifying what sum should be paid out of the sum deposited in said Mercantile Trust Company of San Francisco in each of said actions.

XIV.

The Court was without jurisdiction to make said order, or any order directing payment of taxes out of said moneys, because it appears from the undisputed facts of the case that said moneys [38] were deposited by complainant with said Mercantile Trust Company of San Francisco pursuant to stipulations by the parties and orders of court in the above-entitled actions that said moneys should be returned to complainant in the event complainant was successful in said actions, or, in the event that the charges collected by complainant should be held excessive, that said moneys should be refunded to the persons from whom they were collected.

XV.

The Court was without jurisdiction to make said or any order directing the payment of taxes out of the moneys deposited by complainant with said Mercantile Trust Company of San Francisco in action No. 15,344 of the above-entitled actions, because it appears from the undisputed facts of the case that said moneys were deposited by complainant with said Mercantile Trust Company of San Francisco pursuant to a stipulation by the parties in the above-

entitled action that said deposit should be subject to the condition that any amount so deposited would be repaid to complainant in case it should be successful in said action, or in case the rates fixed by the ordinance in question should be held valid, then said amounts would be returned to the persons entitled thereto, and were not deposited in said Mercantile Trust Company of San Francisco pursuant to any order of court directing that said moneys should be held subject to the order of the court in the above-entitled action.

XVI.

The Court erred in making said order, because it appears from the undisputed facts of the case that said Mercantile Trust Company of San Francisco had paid the one per cent tax assessed against it for the fiscal year 1913-1914 under the provisions [39] of Article XIII, Section 14, of the Constitution of California.

WHEREFORE, said complainant, Spring Valley Water Company, prays that the order of the above-entitled court be set aside and that an order be entered denying the aforesaid application.

Dated: San Francisco, California, December 30, 1914.

EDWARD J. McCUTCHEN,
McCUTCHEN, OLNEY & WILLARD,
Of Counsel for Complainant.
A. CRAWFORD GREENE,
Solicitors for Complainant.

[Endorsed]: Filed Dec. 30, 1914. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [40]

*In the District Court of the United States, Northern
District of California, Second Division.*

Nos. 14,735—14,892—15,131—15,569—15,344—26.

SPRING VALLEY WATER COMPANY, a Cor-
poration,

Complainant,

vs.

CITY AND COUNTY OF SAN FRANCISCO
et al.,

Defendants.

**Order Permitting an Appeal and Fixing Amount of
Cost Bond on Appeal.**

WHEREAS, in the District Court of the United States, Ninth Circuit, Northern District of California, on the 1st day of December, 1914, an order was made and entered in the above-entitled cause, wherein and whereby it was ordered that the sum of \$8,479.89 be paid to the Tax Collector of the City and County of San Francisco, State of California, out of certain sums deposited with MERCANTILE TRUST COMPANY OF SAN FRANCISCO, subject to the orders of the above-entitled court in the above-entitled actions, and wherein and whereby it was further ordered that John A. Schaertzer, Special Master in Chancery in said actions, draw his check upon said bank for the payment of said sum of \$8,479.89, as taxes, out of the sums deposited and impounded in said bank as aforesaid; and,

WHEREAS, Spring Valley Water Company, a corporation, complainant in the above-entitled action,

has, on this [41] 30th day of December, 1914, filed its petition for the allowance of an appeal from said order to the United States Circuit Court of Appeals, Ninth Circuit, together with an assignment of errors, in and by which said petition it has prayed that an order be made fixing the amount of the cost bond which it shall give and furnish on said appeal;

NOW, THEREFORE, in consideration of the premises, and good cause appearing therefor, it is ordered that said appeal be, and the same is hereby, permitted and allowed.

IT IS FURTHER ORDERED, that the said Spring Valley Water Company, a corporation, complainant herein, shall file its undertaking and cost bond in form and substance conditioned and with sureties in accordance with the provisions of the law and the rules and practice of this court in the said United States District Court in the sum of \$300 00/100, which said bond and sureties thereon shall be approved before filing, and said amount is hereby fixed as the amount of said bond. Said bond will be approved by a judge of this court.

WM. C. VAN FLEET,
United States District Judge.

[Endorsed]: Filed Dec. 30, 1914. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [42]

*In the District Court of the United States, Northern
District of California, Second Division.*

Nos. 14,735—14,892—15,131—15,569—15,344—26.

SPRING VALLEY WATER COMPANY, a Cor-
poration,

Complainant,

vs.

CITY AND COUNTY OF SAN FRANCISCO
et al.,

Defendants.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS:

That we, SPRING VALLEY WATER COMPANY, a Corporation, as principal, and MASSACHUSETTS BONDING AND INSURANCE COMPANY, a Corporation organized under the laws of the State of Massachusetts, and duly authorized to execute bonds and undertakings in judicial proceedings pending in the courts of the United States, as surety, are held and firmly bound unto the CITY AND COUNTY OF SAN FRANCISCO, a Municipal Corporation, and the Tax Collector of said city and county, in the full and just sum of Three Hundred (300) Dollars, lawful money of the United States, to be paid to the said City and County of San Francisco, a municipal corporation, and the Tax Collector of said city and county, to which payment well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our

heirs, successors, representatives and assigns firmly by these presents. [43]

Sealed with our seals, and dated this 30th day of December, 1914.

WHEREAS, the above-named complainant, Spring Valley Water Company, a corporation, has obtained from the District Court of the United States, Northern District of California, its order allowing said complainant to appeal to the United States Circuit Court of Appeals in and for the Ninth Circuit, to reverse an order made and entered in the above-entitled actions, wherein and whereby it was ordered that the sum of \$8,479.89 be paid to the Tax Collector of the City and County of San Francisco, State of California, out of certain sums deposited with MERCANTILE TRUST COMPANY OF SAN FRANCISCO, subject to the orders of the above-entitled court in the above-entitled actions, and wherein and whereby it was further ordered that John A. Schaertzer, Special Master in Chancery in said actions, draw his check upon said bank for the payment of said sum of \$8,479.89, as taxes, out of the sums deposited and impounded in said bank as aforesaid;

NOW, THEREFORE, the condition of this obligation is such that if the above-named complainant, Spring Valley Water Company, a corporation, shall prosecute such appeal to effect, and answer all costs if it shall fail to make good said plea, then this obligation shall be void; otherwise, to remain in full force and effect.

IN WITNESS WHEREOF, said SPRING VALLEY WATER COMPANY, a Corporation, has caused these presents to be executed by its Vice-president and Secretary, thereunto duly authorized, and its corporate seal to be hereunto affixed, and said MASSACHUSETTS BONDING AND INSURANCE COMPANY, a Corporation, has caused [44] these presents to be executed by its Attorneys in Fact, thereunto duly authorized, and its corporate seal to be hereunto affixed, this 30th day of December, 1914.

[Seal] SPRING VALLEY WATER COMPANY.

By S. P. EASTMAN,
Vice-President.

By JOHN E. BEHAN,
Secretary.

[Seal] MASSACHUSETTS BONDING
AND INSURANCE COMPANY.

By JOHN H. ROBERTSON and
FRANK M. HALL,
Attorneys in Fact.

The foregoing bond is hereby approved this 30th day of December, 1914.

WM. C. VAN FLEET,
Judge.

[Endorsed]: Filed Dec. 30, 1914. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [45]

*In the District Court of the United States, Northern
District of California, Second Division.*

Nos. 14,735—14,892—15,131—15,569—15,344—26.

SPRING VALLEY WATER COMPANY, a Cor-
poration,

Complainant,

vs.

CITY AND COUNTY OF SAN FRANCISCO
et al.,

Defendants.

Praeceptum [for Transcript of Record].

The clerk of the above-entitled court will please prepare a transcript of the record for the appellate court in the above-entitled cause, and is directed to insert therein the following:

(1) The notice of motion for an order directing the payment of taxes on the impounded moneys.

(2) The agreed statement heretofore filed in the above-entitled cause on December 29, 1914.

(3) The order of court directing that the sum of \$8,479.89 be paid to the Tax Collector of the City and County of San Francisco, State of California, out of certain sums deposited with Mercantile National Bank of San Francisco, subject to the orders of the above-entitled court in the above-entitled actions.

(4) The order of court correcting the above-mentioned order so as to refer to Mercantile Trust Company of San Francisco instead of to Mercantile National Bank of San Francisco. [46]

(5) All papers filed by complainant, Spring Val-

ley Water Company, a corporation, in the prosecution of its appeal, including petition for appeal, assignment of errors, order permitting appeal, and citation on appeal, the appeal bond and the approval of the same.

EDWARD J. McCUTCHEN,
A. CRAWFORD GREENE,
Solicitors for Complainant.

McCUTCHEN, OLNEY & WILLARD,
Of Counsel for Complainant.

[Endorsed]: Filed Jan. 2, 1915. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [47]

*In the District Court of the United States, in and for
the Northern District of California, Second
Division.*

Nos. 14,735—14,892—15,131—15,569—15,344—26.

SPRING VALLEY WATER COMPANY, a Corporation,

Complainant,

vs.

CITY AND COUNTY OF SAN FRANCISCO
et al.,

Defendants.

**Certificate of Clerk U. S. District Court to Transcript
of Record.**

I, Walter B. Maling, Clerk of the District Court of the United States, in and for the Northern District of California, do hereby certify the foregoing forty-seven (47) pages, numbered from 1 to 47 inclusive,

to be full, true and correct copies of the records and proceedings as enumerated in the praecipe for transcript of record, as the same remain on file and of record in the above-entitled cause, and that the same constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that the cost of the foregoing transcript of record is \$28.40; that said amount was paid by Messrs. McCutchen, Olney & Willard, attorneys for plaintiff; and that the original citation issued herein is hereunto annexed.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 2d day of January, A. D. 1915.

[Seal]

WALTER B. MALING,

Clerk.

By J. A. Schaertzer,

Deputy Clerk.

[Ten Cents Internal Revenue Stamp. Canceled
Jan. 2, 1915. J. A. S.]

*In the District Court of the United States, Northern
District of California, Second Division.*

Nos. 14,735—14,892—15,131—15,569—15,344—26.

SPRING VALLEY WATER COMPANY, a Corporation,

Complainant,

vs.

CITY AND COUNTY OF SAN FRANCISCO
et al.,

Defendants.

Citation [on Appeal (Original)].

United States of America.—ss.

The President of the United States, to City and County of San Francisco, a Municipal Corporation, the Tax Collector of Said City and County, and Percy V. Long, City Attorney, Attorney for Said Tax Collector, and for Said City and County, Greeting:

YOU ARE HEREBY CITED and admonished to be and appear at a United States Circuit Court of Appeals, for the Ninth Circuit, to be holden at the City and County of San Francisco, State of California, on the 29th day of January, 1915, being within thirty days from the date hereof, pursuant to an order allowing an appeal filed in the clerk's office of the District Court of the United States, for the Northern District of California, Second Division, wherein Spring Valley Water Company, a corporation, complainant in said actions, is appellant, and you are appellees, to show cause, if any there be, why the order made and entered in said actions, wherein and whereby it was ordered, as in said order allowing appeal mentioned, that the sum of \$8,479.89 be paid to the Tax Collector of the City and County of San Francisco, State of California, out of certain sums deposited with Mercantile Trust Company of San Francisco, subject to the orders of the above-entitled court in the above-entitled actions, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable WILLIAM C. VAN FLEET, United States District Judge, for the Northern District of California, this 31st day of December, 1914.

WM. C. VAN FLEET,
United States District Judge.

Service of the within Citation and receipt of a copy is hereby admitted this 2d day of January, 1915.

PERCY V. LONG.

[Endorsed]: 14,735—14,892—15,131—15,569—15,344 and No. 26. In the District Court of the United States, Second Division, Northern District of California. Spring Valley Water Company, a Corporation, Complainant, vs. City and County of San Francisco, et al., Defendants. Citation. "A" Filed Jan. 2, 1915. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

[Endorsed]: No. 2543. United States Circuit Court of Appeals for the Ninth Circuit. Spring Valley Water Company, a Corporation, Appellant, vs. City and County of San Francisco, a Municipal Corporation, and Tax Collector of said City and County, Appellees. Transcript of Record. Upon Appeal from the United States District Court for the Northern District of California, Second Division.

Filed January 2, 1915.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

At a stated term, to wit: the October Term A. D. 1914, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Monday, the eleventh day of January, in the year of our Lord one thousand nine hundred and fifteen. Present: The Honorable WILLIAM W. MORROW, Circuit Judge, Presiding; Honorable WILLIAM C. VAN FLEET, District Judge.

Nos. 2547 to 2559, inclusive.

SPRING VALLEY WATER COMPANY, a Corporation,

Appellant,

vs.

CITY AND COUNTY OF SAN FRANCISCO, a Municipal Corporation, and TAX COLLECTOR OF SAID CITY AND COUNTY,
Appellees.

Order That Agreed Stipulation of Facts in Spring Valley Water Co. vs. City and County of S. F. may be Considered Part of Records in the Above-entitled Actions, etc.

On motion of Mr. A. Crawford Greene, counsel for the appellants, and by consent of Mr. Percy V. Long, counsel for the appellees, and pursuant to the stipulation of counsel filed January 5, 1915, it is ORDERED that the Agreed Stipulation as to facts contained in the Transcript of the Record in the cause entitled Spring Valley Water Company, a Corporation, Ap-

pellant, vs. City and County of San Francisco, a Municipal Corporation, and Tax Collector of said City and County, Appellees, No. 2543, may, for the purposes of appeal, be considered as a part of each of the Transcripts of the Records in the above-entitled actions in the same manner and to the same effect as if fully set out and inserted in each of said transcripts.

On like motion, it is FURTHER ORDERED that the above-entitled causes be, and hereby are assigned for hearing with the cause entitled Spring Valley Water Company, a Corporation, Appellant, vs. City and County of San Francisco, a Municipal Corporation, and Tax Collector of said City and County, Appellees, No. 2543, on March 18, 1915, and that all of said cases may be submitted on one brief on behalf of each of the respective parties hereto.

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

Nos. 2543, 2547, 2548, 2549, 2550, 2551, 2552, 2553,
2554, 2555, 2556, 2557, 2558, 2559.

SPRING VALLEY WATER COMPANY, a Corporation,

Appellant, .

vs.

CITY AND COUNTY OF SAN FRANCISCO et al.,
Respondents.

**Stipulation [That Agreed Stipulation of Facts
Contains All Material Facts, etc.].**

WHEREAS, on the first day of December, 1914,

the District Court of the United States, Northern District of California, Second Division, in actions Nos. 14,735—14,892—15,131—15,569—15,344 and 26, made and entered fourteen separate orders wherein and whereby it was ordered and directed that specified sums of money be paid to the Tax Collector of the City and County of San Francisco out of certain sums deposited with certain banks and depositories, subject to the orders of the aforesaid district court in the aforesaid actions; and,

WHEREAS, by stipulation of the parties hereto, each of said orders was made upon the same Agreed Stipulation as to facts; and,

WHEREAS, in action No. 2543 in the above-entitled court, on appeal from one of the aforesaid fourteen orders of said district court, the said Agreed Stipulation as to facts is fully set out and contained in the transcript of the record in said district court; and,

WHEREAS, by stipulation of the parties hereto and an order of the above-entitled court made in pursuance of said stipulation, the said Agreed Stipulation as to facts is incorporated by reference in each of the transcripts of the records in actions Nos. 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558 and 2559 in the above-entitled court;

NOW, THEREFORE, it is hereby stipulated and agreed by and between the parties hereto that the said Agreed Stipulation As to Facts contains all the material facts upon which the said district court made its said orders as aforesaid, and that said Agreed Stipulation as to facts contains all the ma-

terial facts which were set out and contained in the affidavit of Edward F. Bryant, Tax Collector in and for the City and County of San Francisco, State of California, which said affidavit is referred to in each of said orders as aforesaid.

Dated Jan. 12, 1915.

E. J. McCUTCHEN,

A. C. GREENE,

Solicitors for Appellant, Spring Valley Water Company.

McCUTCHEN, OLNEY & WILLARD,

Of Counsel for Appellant.

PERCY V. LONG,

City Attorney, Solicitor for Respondents.

[Endorsed]: Nos. 2543, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559. United States Circuit Court of Appeals for the Ninth Circuit. Spring Valley Water Company, a Corporation, Appellant, vs. City and County of San Francisco et al., Respondents. Stipulation. Filed Jan. 12, 1915. F. D. Monckton, Clerk.

- 2

Nos. 2543, 2547, 2548, 2549, 2550, 2551, 2552, 2553,
2554, 2555, 2556, 2557, 2558, 2559

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SPRING VALLEY WATER COMPANY

(a corporation),

Appellant,

vs.

CITY AND COUNTY OF SAN FRANCISCO

(a municipal corporation) and TAX COL-

LECTOR of said City and County,

Appellees.

BRIEF FOR APPELLANT.

EDWARD J. McCUTCHEN,

A. CRAWFORD GREENE,

Solicitors for Appellant.

McCUTCHEN, OLNEY & WILLARD,

Of Counsel.

Filed this.....day of March, 1915.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

Filed

MAR 8 - 1915

F. D. Monckton

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

SPRING VALLEY WATER COMPANY

(a corporation),

Appellant,

vs.

CITY AND COUNTY OF SAN FRANCISCO

(a municipal corporation) and TAX COL-
LECTOR of said City and County,

Appellees.

Nos. 2543,
2547,
2548,
2549,
2550,
2551,
1552,
2553,
2554,
2555,
2556,
2557,
2558,
2559.

BRIEF FOR APPELLANT.

The appeals herein considered involve the validity of fourteen separate orders of the District Court directing the payment of taxes on moneys impounded in various San Francisco banks to await the determination of certain actions pending in that court. It was ordered by this court that the causes as above entitled should all be submitted on one brief (Tr. pp. 53, 54).

Statement of Facts.

In June, 1908, complainant filed, in what was then the Circuit Court of the United States, its bill in equity,

in action numbered 14735, against the City and County of San Francisco and the Board of Supervisors thereof, in which complainant prayed that the enforcement of rates to be charged during the fiscal year 1908-09 for supplying water to the City and County of San Francisco and its inhabitants, as fixed by defendant, should be enjoined. Similar actions with reference to the rates for subsequent fiscal years were thereafter instituted in 1909, 1910, 1911, 1912 and 1913. These actions are numbered, respectively, 14892, 15131, 15344, 15569 and 26 (Tr. pp. 2-12 incl.).

In action numbered 14735, a preliminary injunction was issued and, as one of the conditions thereof, it was required that complainant should deposit in some bank or banks to be agreed upon by the parties to the action the difference between the rates fixed by the municipal authorities and those actually collected by complainant under the injunction, such excess to continue on deposit until the final outcome of the action. It was further provided that such deposits should be subject to the order of the lower court and should only be paid out on checks drawn by a special master and countersigned by a Federal judge. A special master was appointed and directed to ascertain and report the amounts collected from each individual consumer. Mercantile Trust Company of San Francisco was subsequently designated by order of court as the depository of the impounded moneys, the order directing that such deposits should be carried under an account entitled "Spring Valley Water Company Special Account", and

that they should be subject to the order of the court as hereinbefore stated (Tr. p. 3).

In actions numbered 15569 and 26, the procedure was the same as that taken in action numbered 14735 (Tr. p. 8).

In actions numbered 14892 and 15131, the procedure was the same, with the exception that complainant proceeded to deposit the moneys collected in excess of the ordinance rates with Mercantile Trust Company of San Francisco without any order of court designating it as the depositary (Tr. p. 8).

In action numbered 15344, the temporary restraining order made no provision for the impounding of the excess moneys, but it was subsequently stipulated by the parties that, so long as the order continued in force, the moneys collected in excess of the ordinance rates should be deposited by complainant with Mercantile Trust Company of San Francisco, and that such moneys should be repaid to complainant or to the rate-payers upon the final determination of the proceeding. The deputy clerk of the District Court was subsequently appointed special master in this action (Tr. p. 9).

In accordance with the orders and stipulations above referred to, complainant from time to time deposited with Mercantile Trust Company of San Francisco the moneys collected by it in excess of the rates complained of in the various actions (Tr. p. 14). Portions of the amounts so deposited in each of the actions were subsequently, from time to time, transferred to certain of the following named institutions:

Wells Fargo Nevada National Bank of San Francisco, Mercantile National Bank of San Francisco, The Crocker National Bank of San Francisco, Bank of California National Association, Union Trust Company of San Francisco, and The Anglo and London Paris National Bank.

The orders authorizing such transfers recited in each case that the amount of money deposited with Mercantile Trust Company of San Francisco was greater, in the opinion of the court, than should be deposited with a single depository; that the above named institutions had theretofore been designated by the court as depositories in bankruptcy proceedings, and that all deposits when made should be credited to Spring Valley Water Company but should be held subject to the order of the court, as had been theretofore provided (Tr. p. 13). On the first Monday in March, 1913, and on the first Monday in March, 1914, there was on deposit in the various actions in the banks hereinabove referred to, the amounts shown at pages 15 to 18 of the Transcript. There was assessed to these banks on the assessment roll of the City and County of San Francisco for the fiscal year 1914-15 the sums hereinabove referred to. In each assessment the designated bank was described as "Receiver of Impounded Moneys" and was further described as "Receiver or Depository under Order of Court of the Impounded Moneys in Equity Suits numbered 14275, 14735, 14892, 15131, 15569, 15344 and 26, District Court of the United States, wherein the Spring Valley Water Company is plaintiff and City and

County of San Francisco et al., defendants.” Separate assessments were made against each bank for the amounts of money on deposit on the first Monday in March, 1913, and on the first Monday in March, 1914. The moneys were assessed on the assessment roll on the valuations hereinbefore referred to, and taxes were levied thereon for the fiscal year at the rate of 2.289 on each \$100 of said valuation. The first assessment in each case was made on the ground that the moneys had escaped assessment for the year 1913-14 (Tr. p. 25). We call particularly to the court’s attention the fact that the assessments were made against the *banks* and that they were made against the banks as receivers.

The two assessments to Mercantile Trust Company of San Francisco were originally assessed to Mercantile National Bank of San Francisco, owing to an erroneous return made by the latter institution. These assessments were corrected by the assessor on the assessment rolls subsequently to November 28, 1914 (Tr. p. 28).

Action numbered 14275, referred to in each of said assessments, is an action similar to those hereinbefore referred to, commenced in June, 1907, but no moneys were ever impounded in said action either by stipulation of the parties, order of court, or otherwise, and no one of the banks to whom such assessment was made has ever had on deposit any moneys in connection with said action (Tr. p. 29).

In no one of the foregoing assessments was any separate assessment made of any money impounded in any specified suit, but the assessment was made of all impounded moneys on deposit with each bank as a whole, such assessments covering any and all moneys on deposit with such banks in all of the actions in which the Spring Valley Water Company was complainant and the City and County of San Francisco was defendant (Tr. p. 29).

In certain other instances no money was on deposit with a designated bank in one or more of the actions mentioned in the assessment. In action numbered 26 no moneys were on deposit with any bank on the first Monday in March, 1913, that action having been commenced in June of that year. As to two of the banks, no money had been deposited in such action up to the first Monday in March, 1914. In action numbered 15569 no money was on deposit in four of the banks on the first Monday in March, 1913 (Tr. p. 29).

Each of the above named banks has paid the one per cent tax assessed against it for the fiscal year 1913-14 and 1914-15, under the provisions of Article XIII, section 14, of the Constitution of the State of California (Tr. p. 30).

On November 30, 1914, application was made to the lower court for orders directing the banks herein named to pay the taxes assessed against them and, at the hearing of said application, the court made its fourteen separate orders directing that sums equivalent to

the taxes assessed be paid out of the various amounts on deposit with the above mentioned banks; and the court further ordered that the special master theretofore appointed should draw his checks upon the banks for the payment of said taxes. It is those orders from which the appeals herein considered have been prosecuted.

Specifications of Error.

Errors have been assigned in the record on appeal from the orders of the District Court. The assignments of error will be discussed, for convenience, under the following specifications:

(1) The taxes were not assessed in accordance with the provisions of section 3647 of the Political Code of California, or any other law of the State of California.

(2) The assessments were void under the provisions of Article XIII, Section 14, of the Constitution of the State of California.

(3) The assessments were void because the moneys were described as having been deposited in one or more actions in which no deposit was ever made, and because no separate assessment was made against the amounts on deposit in each respective action.

(4) The orders directing the payment of taxes directed the payment to the tax collector of an entire amount to cover the taxes assessed against each bank and did not specify what amount should be paid out of the moneys impounded in each respective action.

(5) The assessment to Mercantile Trust Company of San Francisco was void because it was originally made to Mercantile Trust Company of San Francisco and changed subsequently to November 28, 1914, without authority of law.

Although not identical, the cases may fairly be said to involve the same problems, except that in the case of Mercantile Trust Company of San Francisco features are presented which are not found in the other appeals. For the convenience of the court we shall make no specific reference in this discussion to the particular facts of the various cases.

I.

THERE WAS NO LEGAL AUTHORITY FOR THE ASSESSMENT.

In attempting to uphold the validity of the assessment and the propriety of the orders made by the District Court, the tax collector is forced to, and does, rely upon the provisions of section 3647 of the Political Code of California, and it is contended that the assessment to each of the banks as "receiver or depository under order of court of the impounded moneys" in the designated action is in compliance with those provisions. The section provides as follows:

"Money and property in litigation in possession of a county treasurer, of a court, county clerk, or receiver, must be assessed to such treasurer, clerk, or receiver, and the taxes be paid thereon under the direction of the court."

There is no authority in the section above quoted for an assessment against a "depository" and it is apparent that banks are neither county treasurers, nor county clerks. The assessment must, therefore, be justified, if at all, upon the theory that the banks are receivers in the various actions. That the banks are not receivers is, we submit, too apparent to require an extended argument. That they are ministerial officers of a court of chancery can hardly be seriously contended. Their only relation to the pending proceedings is that they are the custodians of funds collected under orders of court made in those proceedings. The relation established is that purely of depository and depositor and the court has no jurisdiction over the banks or their officers, or any one connected with them, excepting that it may require the banks to honor checks drawn by the special master and countersigned by a district judge. The direction of the court for the deposit of moneys no more constitutes the banks receivers than would a similar direction from the court for the deposit in the United States Mint constitute that institution a receiver. Each of the actions herein considered was a suit for injunctive relief against the action of a legislative body, and was not of such a nature that the appointment of a receiver could have been, on any theory, upheld. The action of the court in requiring the impounding of the income collected in excess of the ordinance rates was obviously for the protection of the rate-payers, and was adopted instead of the usual method of requiring a bond. At the risk of repetition, we shall briefly restate the procedure taken.

As a condition of granting the injunction or restraining order, as the case may be, the court directed that the excess moneys be deposited in some bank, to be agreed upon by the parties, to await the outcome of the suit. A deputy clerk of the court was appointed special master to account for the amounts collected from the various consumers. Mercantile Trust Company of San Francisco was subsequently designated as the depository for such moneys and the deposit was directed to be credited to Spring Valley Water Company Special Account, subject to the order of the court, and to be paid out only on checks drawn by the special master and countersigned by a Federal judge. The moneys were, in fact, so deposited, and eventually redistributed to other banks. Is it conceivable that, by this procedure, the banks became receivers? That they are not receivers in any sense is tacitly conceded by the wording of the lower court's orders. It will be recalled that, at the hearing, when application was made that the court make its order directing the banks to pay the taxes, the court's attention was called to the fact that it had no jurisdiction over the banks and no power to order them to pay taxes. It thereupon proceeded to cause the special master to voluntarily come forward and use the funds belonging to the parties to the litigation to pay a tax not assessed against him or any person who was actually entitled or authorized to distribute the funds.

In action numbered 15344 the deposits were not even in the possession of the court, but were the private deposits of the complainant made pursuant to a stipu-

lation, entered into between defendants and complainant, that the latter would make such deposits while the restraining order continued in force.

If the theory upon which the lower court must have proceeded is the correct one, no tax can properly be assessed against a receiver who deposits funds in bank, but they must be assessed against the depository itself. This is, of course, directly opposed to every decision rendered by the state courts on this subject. A receiver is not only authorized, but required, to pay any tax properly assessed, and to set off any debts for which the fund is liable.

Los Angeles v. Los Angeles Water Co., 137 Cal. 699.

Our contention is that where the word "receiver" is used in section 3647 it means exactly what it says. If this contention is sound it is entirely clear that the depositories herein referred to are not in any sense, and never have been, receivers of moneys collected in the pending rate cases. The funds were in the custody and under the control of the lower court.

It is hardly necessary for us to call to the court's attention the fact that if the banks were not receivers the assessment against them in each instance was not made to the proper party and was, therefore, void.

In

City of San Luis Obispo v. Pettit, 87 Cal. 499, the Supreme Court of California determined that where

a sum of money had been deposited with the county treasurer in his official capacity under the order of a superior court in a pending suit, the assessment of that fund to the plaintiff in the case, instead of to the county treasurer, rendered the assessment invalid. The court, in considering section 3628 of the Political Code, which provides that "no mistake in the name of the owner, or supposed owner, of real property, shall render the assessment thereof invalid", conceded the application of the section to real property, but held that it had no application to personal property. The same result has, of course, been reached in other instances. It was, for instance, said in

Lake County v. S. B. Q. M. Co., 66 Cal. 17:

"Unless we can take judicial notice that 'Sulphur Banks Q. S. M. Co.' is the equivalent or an abbreviation of 'Sulphur Bank Quicksilver Mining Company', or unless there was evidence tending to prove that the corporation defendant was known by the name 'Sulphur Banks Q. S. M. Co.' the assessment of the personal property cannot be upheld. Tax proceedings are *in invitum*, and to be valid, must be in strict accordance with the statute. Without an assessment, all subsequent proceedings are nullities; and in making the assessment the provisions of the statute under which it is to be made must be observed with particularity. * * *

" 'Sulphur Banks Q. S. M. Co., F. Fiedler, Agt.,' is not the same thing as 'Sulphur Bank Quicksilver Mining Company.' We may conjecture, or very strongly suspect, that the assessor *meant* to assess the defendant as the owner of the personal property, but he did not assess the defendant. * * * It is plain that we cannot identify the name to

which the personal property was assessed as an abbreviation of the name of defendant, even if an assessment to an abbreviation would be valid."

We quote further from

Houser & Haines Mfg. Co. v. Hargrove, 59 Pac. 947, 949:

"Personal property must be assessed to the owner or the person claiming it, or in whose possession or control it was, at 12 o'clock m. on the first Monday of March next preceding the assessment. Pol. Code, sec. 3628. Without a valid assessment, all subsequent proceedings are nullities, and in making the assessment the provisions of the statute under which it to be made must be observed with particularity. An assessment of personal property to a named person other than the owner is absolutely void."

It is, of course, well settled that statutes imposing liability for taxation are to be strictly construed as against the taxing authority and in favor of the tax payer.

Eidman v. Martinez, 184 U. S. 578;

U. S. v. Wigglesworth, 2 Story 367;

San Francisco v. Banbury, 106 Cal. 129.

It will be conceded that the District Court was without authority to direct the payment of taxes out of the impounded moneys unless there was a valid assessment against such moneys. It was not the province of the court to order that the taxes be paid for any other reason, and there was no valid assessment.

II.

**THE ASSESSMENT IS VOID UNDER THE PROVISIONS OF
ARTICLE XIII, SECTION 14, OF THE CALIFORNIA CON-
STITUTION.**

The assessments herein considered were made against the banks and they must stand or fall as such. It has already been shown that they were not made, and could not properly be made, against the banks as receivers. Were they valid against the banks individually? It is submitted that they were not. The assessments cannot be upheld as a tax on account of the funds on deposit because of the provisions of Article XIII, section 14 of the Constitution of California. By amendment enacted in 1910 for the purpose of separating the local and state taxation, there is imposed upon corporations engaged in certain callings—those of public service corporations, insurance companies, banks and trust companies—the obligation to pay certain taxes which are to be applied exclusively to state purposes. It is further provided that those taxes shall be “in lieu of all other taxes and licenses, state, county and municipal” upon all property used in the conduct of business within the state. The legislature in 1911 passed an act to carry into effect the constitutional amendment (Stats. 1911, p. 530). This act was amended in 1913 (Stats. 1913, p. 3615). The Supreme Court of California has given full effect to the provision in the amendment respecting the exemption from local taxa-

tion of the operative property of corporations which come within the designated classes.

San Francisco v. Pac. T. & T. Co., 166 Cal. 244;

Hartford Ins. Co. v. Jordan, 47 Cal. Dec. 175;

Pac. G. & E. Co. v. Roberts, 48 Cal. Dec. 272;

Southern Trust Co. v. Los Angeles, 48 Cal.

Dec. 530;

Hughes v. Los Angeles, 48 Cal. Dec. 537.

It appears in the record that the taxes assessed under the provisions hereinabove referred to have been paid by the various banks with whom money was impounded in the actions herein considered, and there is, of course, no room for doubt that funds on deposit with a bank constitute a portion of its operative property. If the taxes were, in all other respects, properly assessed, they were plainly invalid, under this constitutional provision, and the orders of the District Court were for that reason improvidently made. It is, of course, further true that if the assessment was valid against the banks, its payment out of funds in the possession of the court was unauthorized.

III.

THE ASSESSMENTS WERE ERRONEOUS IN THAT MONEYS WERE DESCRIBED AS HAVING BEEN DEPOSITED IN ACTIONS IN WHICH NO DEPOSIT WAS EVER MADE, AND IN NOT SEPARATELY ASSESSING THE AMOUNTS ON DEPOSIT IN EACH SUIT.

As we have already shown in the Statement of Facts, all the assessments refer to the moneys as having been

deposited in certain actions in which, in fact, no deposit had been made. For example, it appears in the record that no deposit was ever made in action numbered 14275. In no one of the seven different funds assessed as having escaped assessment for the year 1913-14 had there been any deposit on account of moneys collected in action numbered 26. Furthermore, and much more important from the viewpoint of complainant, the assessments did not pretend to separately assess the amount on deposit in each action, but assessed all the funds held by any one bank as a unit. It is submitted that this failure to make separate assessments was not only erroneous, but very plainly so. Although it so happens that the same corporation is complainant in each of the actions, the defendants are not identical, different issues are involved in the various actions, and different judgments may ultimately be rendered. Complainant may be successful in some cases and unsuccessful in others. Furthermore, the rate-payers interested in the outcome of the various actions are by no means the same. The total of funds on deposit with any one bank is in no way a unit. It is composed of different amounts, subject to different claims, and deposited under varying circumstances. That this contention is sound is substantiated by the action of the court in distributing the funds originally deposited with Mercantile Trust Company of San Francisco. In effecting such transfer to the other banks herein referred to, a separate order with reference to the funds on deposit

in each respective action has always been made by the court, and the amount credited to each action is as separate and distinct a fund as if the parties to the action were different, and as if the actions were pending in different courts. The only possible justification for the procedure followed is that the assessment was one against the banks, and not against the funds impounded. If that were so, it would, of course, plainly be of no consequence to complainant or to the rate-payers what the amount of the tax was, or what the method of enforcing its payment might be. The theory that the banks are liable for the tax is, however, not the one on which the tax collector has proceeded, and is one which, as we have already shown, cannot be supported by any authority.

The invalidity of an assessment on all the funds held by one bank as a unit may perhaps be most clearly shown by assuming that a water company had instituted an action in the lower court to enjoin the enforcement of water rates, and that a telephone company had instituted another action in the Superior Court of this state to enjoin the enforcement of telephone rates, moneys being deposited in both of these actions with the same bank, pursuant to orders made by the respective courts in which the actions were pending. Can it be for a moment fairly contended that a single assessment against the total fund deposited with the bank in both of the actions, without designating the respective burden which each fund must bear, would be valid?

IV.

THE ORDERS THEMSELVES WERE ERRONEOUS IN THAT THEY FAILED TO SPECIFY WHAT AMOUNT SHOULD BE PAID OUT OF THE MONEYS ON DEPOSIT IN EACH RESPECTIVE SUIT.

For similar reasons the orders of the court directing the payment of the taxes assessed were erroneous in that they directed that one sum should be paid by each bank on account of the tax assessed for each year, and did not specify or determine what amounts should be paid out of the moneys on deposit in each respective action. The orders should either have specified the amounts to be paid out of the funds impounded in each proceeding, or they should have directed that the total tax be properly apportioned against each fund.

V.

THE ASSESSMENT TO MERCANTILE TRUST COMPANY OF SAN FRANCISCO WAS INVALID SINCE IT WAS ORIGINALLY MADE TO MERCANTILE NATIONAL BANK OF SAN FRANCISCO AND WAS CHANGED WITHOUT AUTHORITY OF LAW.

The assessments to Mercantile Trust Company of San Francisco were invalid because they were originally made to Mercantile National Bank of San Francisco and were changed by the assessor on the assessment roll after November 28, 1914. In the case of

Savings and Loan Society v. San Francisco, 146
Cal. 673,

the Supreme Court of California held that:

“it must * * * be conceded that the assessor had no power to make any changes in the assess-

ment after he delivered his roll to the board of equalization, unless such changes were authorized by the board of supervisors under sections 3679 and 3681 of the Political Code, or with the written consent of the city and county attorney under section 3881 of the same code."

In the case of

S. D. & A. Ry. Co. v. Board of Equalization, 164
Cal. 44,

the same court, following the rule of the previous case, decided that the power of the State Board of Equalization, in the matter of the making of assessments for state purposes and the equalization thereof, was at an end upon the final delivery of the record of assessments by that board to the state comptroller. It was also determined that

"it must be presumed that official duty has been regularly performed and, consequently that the State Board of Equalization finally delivered its record of assessments to the State Comptroller on July 1, 1912."

By section 3652 of the Political Code the assessor is required to complete his assessment book on or before the first Monday in July; and by section 3654, he is required to deliver it, as soon as completed, to the secretary of the Board of Supervisors, sitting as the County Board of Equalization. The corrections in the assessments in question can only be justified if they were made in accordance with the provisions of the Political Code, cited in the cases above referred to. Sections 3679 and 3681, mentioned above, refer to changes authorized by the Board of Supervisors sitting

as a County Board of Equalization, and have no application here. The correction must be justified, if at all, under section 3881. This section provides:

“Clerical omissions or errors or defects in descriptions or defects in form in any assessment-book, when it can be ascertained from the assessment-book or from the assessor’s maps or block-books, or from the list furnished by the property owner, what was intended to be assessed, or what should have been assessed, may, with the written consent of the district attorney, be supplied or corrected by the assessor at any time after the assessment was made, prior to the sale for delinquent taxes; * * * In the city and county of San Francisco the written consent of the city attorney shall have the same force and effect as the written consent of the district attorney.”

The change in the name of the person to whom personal property is assessed is, of course, not one of the “clerical omissions or errors or defects in descriptions or defects in form” to which the statute refers. As we have shown from the cases above discussed under a previous section, an error in the name of the person to whom the tax on personal property is assessed absolutely invalidates the tax. Furthermore, the correction is authorized only “when it can be ascertained from the assessment-book, or from the assessor’s maps or block-books, or from the list furnished by the property owner, what was intended to be assessed, or what should have been assessed”. The change made in the case of Mercantile National Bank of San Francisco cannot be on any theory brought within these limits. The section has been construed by the Supreme Court

of this state. We quote as follows from the opinion of that court in

County of San Luis Obispo v. White, 91 Cal. 432:

“In the original roll the special bridge tax was not carried to nor entered in the column headed ‘Total tax’; but after the roll was made up and placed in the hands of the tax collector, no sale for delinquent taxes having been made, the district attorney gave his consent, in writing, to the assessor to enter the said tax in the column last mentioned, whereupon the assessor made the proper entries in that column. This is now urged as error. The total tax appeared in the column headed ‘Road Tax’, and consequently it was clear what the omitted total tax was. It was therefore competent for the district attorney to authorize the assessor to supply the omission, under section 3881 of the Political Code.”

From

Los Angeles v. Los Angeles City Water Co.,
137 Cal. 699,

we quote as follows:

“It is contended that this assessment consisted only of the name of the receiver and a copy of his letter. That it was defective in form may be conceded, but the correctness of the figures is not questioned. The assessor, however, with the written consent of the district attorney, corrected the errors and defects in form under the provision of section 3881 of the Political Code, but no change was made in the facts and figures stated in the receiver’s letter.”

It is therefore apparent that the assessment against Mercantile Trust Company of San Francisco was invalid for the reasons herein considered, as well as for the other reasons previously assigned.

Conclusion.

The funds on deposit are the property either of appellant or of the rate-payers of San Francisco. The fact that their deposit is temporarily under the control of the lower court does not warrant that court in causing their withdrawal unless there is legal authority therefor. The court was under the duty, in so far as any discretion was imposed upon it, of maintaining the integrity of those funds. This was not the course followed. Payments were made therefrom which were not only not required, but for which there was no legal authority.

It is submitted that the orders of the lower court should be reversed, with directions to take such steps as may be necessary to relieve the parties from the effects of the said orders.

Dated, San Francisco,

March 6, 1915.

Respectfully submitted,

EDWARD J. McCUTCHEN,

A. CRAWFORD GREENE,

Solicitors for Appellant.

McCUTCHEN, OLNEY & WILLARD,

Of Counsel.

Nos. 2543, 2547, 2548, 2549, 2550, 2551, 2552, 2553,
2554, 2555, 2556, 2557, 2558, 2559.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

SPRING VALLEY WATER COMPANY,
a Corporation,

Appellant,

vs.

CITY AND COUNTY OF SAN FRAN-
CISCO, a Municipal Corporation, and TAX
COLLECTOR of said City and County,

Appellee.

BRIEF FOR APPELLEES

PERCY V. LONG,

City Attorney,

ROBERT M. SEARLS,

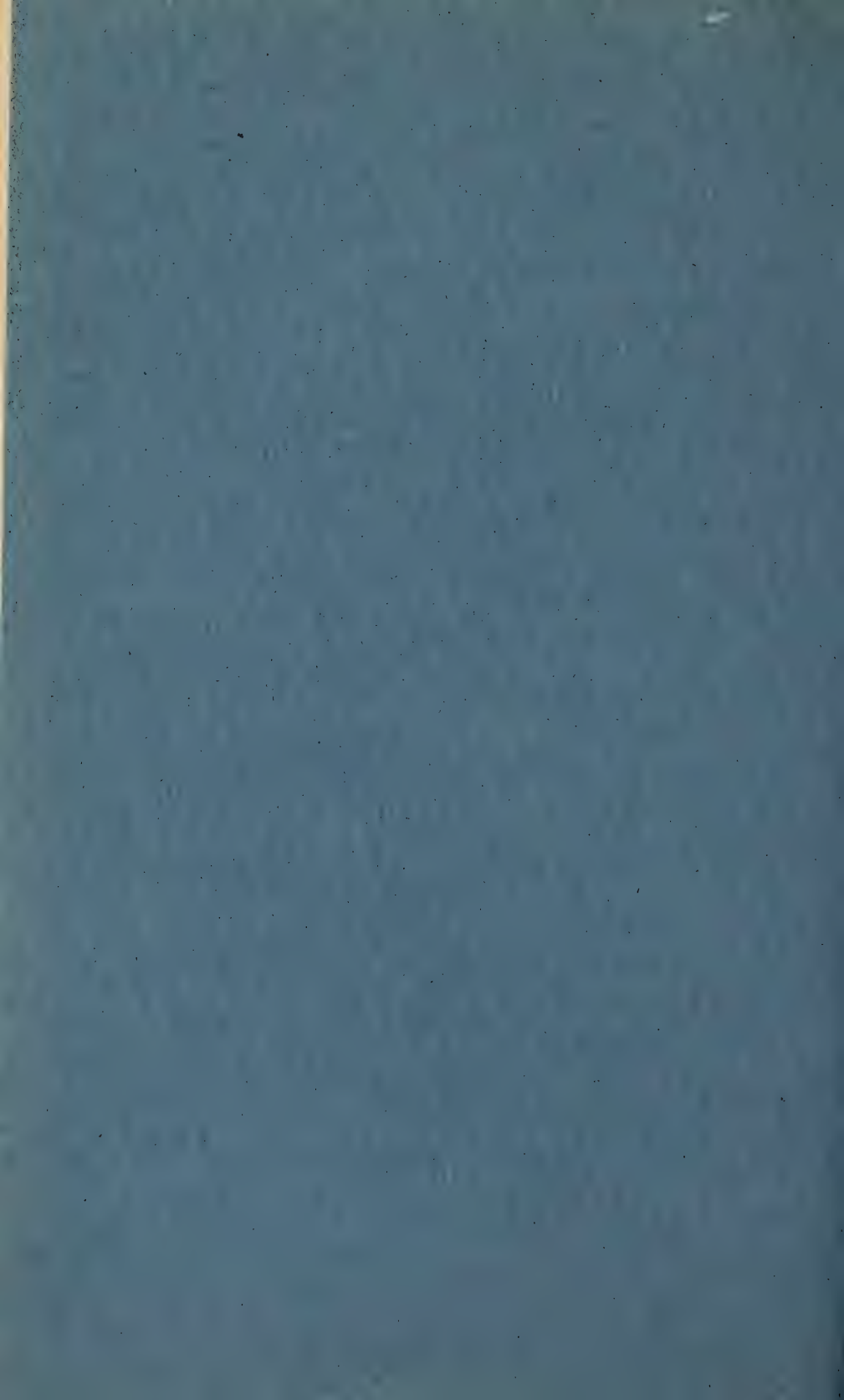
Assistant City Attorney,

Solicitors for Appellees.

Filed this day of March, A. D. 1915.

F. D. MONCKTON, Clerk.

By....., Deputy Clerk.



Nos. 2543, 2547, 2548, 2549, 2550, 2551, 2552, 2553,
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BRIEF FOR APPELLEES

The principal facts on which the orders appealed from were based are sufficiently stated in appellant's brief. We shall have occasion in discussing the assignments of error to refer to one or two parts of the record not mentioned by counsel, but no controversy exists as to the facts underlying appellee Tax Collector's application for said orders.

I.

THEORY ON WHICH ORDER WAS
GRANTED.

Before taking up the several assignments of error raised by appellant, a brief statement of the law on which the appellee relied in making his application may be in order. It is found in the Constitution of the State of California and the Political Code.

Article XIII, Section 1 of the Constitution provides:

“All property in the state except as otherwise in this constitution provided, not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided by law, or as hereinafter provided. The word ‘property’, as used in this article and section, is hereby declared to include moneys, credits, bonds, stocks, dues, franchises and all other matters and things, real, personal, and mixed, capable of private ownership.”

Section 10 of the same article reads as follows:

“All property, except as otherwise in this constitution provided, shall be assessed in the county, city, city and county, town or township, or district in which it is situated, in the manner prescribed by law.”

The Political Code contains the following provisions:

“Sec. 3607. All property in this state, not exempt under the laws of the United States, excepting fruit and nut-bearing trees under the age of four years from the time of planting in

orchard form, and grapevines under the age of three years from the time of planting in vineyard form, growing crops, property used exclusively for public schools, free public libraries, and free museums, and such as may belong to the United States, this State, or to any county or municipal corporation within this State, is subject to taxation, as in this code provided; but nothing in this code shall be construed to require or permit double taxation."

"Sec. 3617. * * * The term 'property' includes moneys, credits, bonds (except railroad or quasi-public corporations), stocks, dues, franchises, and all other matters and things, real, personal, and mixed, capable of private ownership."

"Sec. 3627. All taxable property must be assessed at its full cash value." * * *

"Sec. 3628. The assessor must, between the first Mondays in March and July of each year, ascertain the names of all taxable inhabitants, and all the property in his county subject to taxation, except such as is required to be assessed by the state board of equalization, and *must assess such property to the persons by whom it was owned or claimed, or in whose possession or control it was, at twelve o'clock meridian, of the first Monday in March next preceding*; but no mistakes in the name of the owner or supposed owner of real property shall render the assessment thereof invalid." * * * (Italics are ours.)

"Sec. 3647. Money and property in litigation in possession of a county treasurer, of a court, county clerk, or receiver, must be assessed to such treasurer, clerk, or receiver, and the taxes be paid thereon under the direction of the court."

"Sec. 3649. Any property discovered by the assessor to have escaped assessment for the last preceding year, if such property is in the ownership or under the control of the same person who

owned or controlled it for such preceding year, may be assessed at double its value."

"Sec. 3881. Clerical omissions or errors or defects in descriptions or defects in form in any assessment-book, when it can be ascertained from the assessment-book or from the assessor's maps or block-books, or from the list furnished by the property owner, what was intended to be assessed, or what should have been assessed, may, with the written consent of the district attorney, be supplied or corrected by the assessor at any time after the assessment was made, prior to the sale for delinquent taxes. * * * The date and nature of every such correction shall be entered on the assessment-book opposite said assessment and the written authority therefor shall be filed by the assessor with the auditor as a public record, and he shall make the proper charges or credits in his account with the tax collector. In the City and County of San Francisco the written consent of the city attorney shall have the same force and effect as the written consent of the district attorney."

"Sec. 3885. No assessment or act relating to assessment or collection of taxes is illegal on account of informality, nor because the same was not completed within the time required by law."

A reading of the foregoing sections demonstrates that it is the intent of the law of this State that all property shall bear its proper proportion of taxation. In the hands of the rate payers this money would have been subject to taxation. In the hands of the Spring Valley Water Company it would have been subject to taxation. In order that such property should not escape taxation because it was placed temporarily under control of the court, the law goes further and provides (Sec. 3647, *supra*) that it

should be assessed to the agency of the court having immediate possession of the same and the taxes paid under the direction of the court.

In support of this interpretation of the law we quote briefly from the oral opinion expressed by the Court below at the hearing of the application:

"I do not care anything about the formal method by which this application is made. Here is the whole thing as it strikes me; here is the testimony, here is certain property that is the property of some owner in this State; it is the property of an owner in this State, whoever ultimately he may be determined to be. The property is in the hands of the Court, it being controlled by the Court through the exigencies or through the course of certain litigation. Now, this Court cannot undertake to prevent the State from having its taxes upon that property. I do not care who the owner is; it being in the hands of the Court, the comity that is due between our dual system of government requires that the Court should not stand in the way of the city getting its taxes upon this property; whoever is finally found to be the owner of this property will simply have that property turned over to him minus what he would have had to pay had it been in his own coffers at the time of the levy of the tax. * * * (Transcript of Proceedings at hearing, page 8.)

"The obligation to pay proper taxes upon property is one of the most solemn obligations that a citizen is under. It is for the maintenance of the government, and I think the authorities sustain the proposition as well, that if there is a description of the property which reasonably serves to identify it, that it can be held for the taxes. * * *

"Here is a case where I doubt, had the assessor come and asked me how to assess this property,

that it would have readily occurred to me how to do it, and I would have in all probability advised him that in my judgment it should be assessed as funds in these various banks. Now that of course does not make it legal if it would not otherwise be so. But it seems to me that it would be an extremely refined technicality that would enable the Court to hold that this description of this property was not sufficient upon which to base a valid tax. I at least would be very strongly disposed to let a higher court determine that it was not. This property should not escape taxation; it is property of citizens of the State. It occupies a very peculiar situation, however, that it cannot be told now whose property it is; it is tangible existent property, but the question as to its ownership is in the clouds." (Transcript of Proceedings at hearing, pages 16, 17.)

The views of the learned judge below are also set forth with great clearness in the oral opinion rendered by him in granting a similar application for payment of taxes on rate moneys impounded in Suit No. 21—*Pacific Telephone and Telegraph Company v. City and County of San Francisco*. We quote briefly from that opinion. References are to pages of typewritten copy of opinion:

"I am satisfied that it falls within the same principle that was held applicable in the Spring Valley cases; that it is, within the provisions of the Political Code, moneys in the hands of the Court involved in litigation, and as such subject to taxation as therein provided. I held in these cases that the fund was not the property of either of the parties to the litigation other than potentially so, the title being *sub judice*. It is a fund accumulated under the circumstances indicated and its destination is wholly subject to the final

determination of the Court—that is, as to whether it is justly the property of the plaintiff or that of the consumers. It is, strictly speaking, property in litigation, and its eventual disposition and ownership cannot be determined until the final decree. But the money is nevertheless subject to taxation; it is within the district; it is a part of the property locally within the City and County of San Francisco which should pay its portion of the municipal taxes, and therefore the tax has been properly levied.” (Transcript, pp. 2 and 3.)

II.

THE COURT BELOW DID NOT VIOLATE EQUITABLE DISCRETION IN ORDER- ING PAYMENT OF THESE TAXES.

We question whether in a Federal Court of Equity the judge should be required to go farther in an application of this kind than to ascertain that the funds in litigation were legally assessable, that they had been apparently assessed in accordance with the spirit of the law and that the taxes thereon had not been paid. If the only questions involved relate solely to the technical correctness of the assessment, the complainant should be permitted to file a protest on behalf of the receivers or depositaries and, with permission of the Court below, bring suit in the State Court to recover the taxes paid under protest, where the technical questions may be passed upon by the tribunal designated for that purpose by Section 3819 of the Political Code—*i. e.*, the Superior Court of the County wherein the taxes were assessed.

In the case of an ordinary receivership, where the receiver was in doubt as to whether the taxes assessed against property in his charge were validly assessed or not, he would pay the taxes under protest and, under leave of court, bring a separate action for their recovery. No reason exists for a different course of procedure in the matter at bar. In other words, the orders made in this matter were merely administrative orders, incidental to the proper administration of the fund while in the hands of a court of equity. It is not a judgment. Complainant is not foreclosed thereby from suing in the name of the depositaries in the State courts to recover taxes paid under protest. In making the orders appealed from the Court below did not necessarily pass on the validity of the assessment. (See oral opinion cited *supra*.) While we admit that the orders made are appealable orders as they finally dispose of the matter so far as the court below is concerned, they were orders made in the exercise of equitable discretion, and we believe that this Court should go no further than to determine whether such discretion was exceeded.

From the standpoint of public policy this view should prevail. An ordinary citizen cannot enjoin the collection of taxes on his property. He must pay them under protest and sue for recovery if he believes them illegally assessed. This rule protects the public treasury from being deprived of the funds necessary to conduct the government. For like reason the court should be justified in requiring a party litigant who makes objection to the assessment of property in

litigation on purely technical grounds to pursue his remedy in the same manner as he would have to act were he actually invested with possession and control of the property.

III.

ASSIGNMENTS OF ERROR.

Having set forth the Appellee's contention with respect to what we believe is the broader view to be taken of these appeals, we proceed to a consideration of Appellant's assignments of error. For convenience, they will be discussed under the same grouping as indicated in Appellant's brief.

A.

THE ASSESSMENT WAS MADE IN ACCORDANCE WITH SECTION 3647 POLITICAL CODE.

It will be noted that under that section, money in the possession of a "county treasurer, of a court, county clerk, or receiver" must be assessed to "such treasurer, clerk or receiver" and the taxes paid under direction of the court. There is no provision in this section for assessing a court as such. Out of respect doubtless for the dignity and convenience of the courts, the law provides that the assessment shall be made to the subordinate officer or agent "in possession" of the fund. The clerk of a federal court

is not a county clerk. Hence the assessment could not be legally made to him. Neither was he, in this case, in possession of either the fund or the credit for the deposit, *i. e.*, the right to draw it out. That right was vested solely in the court and the law provides that the taxes shall be assessed against the particular officer or agent of the court "in possession" of the fund. The fund in this case was in the actual possession of the Mercantile Trust Company and the other banks, subject to the order of the court. It must either be assessed to the banks as receivers, or, and we understand that this is the position taken by Appellant, it must escape taxation.

Was the assessor's designation of the banks as "receivers or depositors," under these circumstances such an informality as should invalidate the entire assessment? We submit that it was not. The banks were designated by the court as "depositories" to receive and keep intact the property in litigation. Owing to their recognized standing as national depositories no bonds were required of them. By accepting the deposits they also accepted the responsibility to account to the court for the moneys so received. They were under obligations to hold these deposits until the court should order their disposition, and to pay them out only upon order of the court. In all but name the banks were receivers and exercised the functions of receivers. A receiver has been defined as

"An indifferent person between the parties to a cause, appointed by a court, to receive or preserve the property or fund in litigation pendente

lite, when it does not seem reasonable to the court that either party should hold it."

Hay v. McDaniel, 60 Northeastern 729, 730.

"An indifferent person between parties appointed by the court to receive the rents, issues, or profits of land, or other thing in question in this court, pending the suit, where it does not seem reasonable to the court that either party should do it."

Booth v. Clark, 17 How. 322, 331;

Atlantic Trust Co. v. Chapman, 208 U. S. 360, 370.

The banks in the matters at bar fulfilled the functions outlined in the above definitions. They were both receivers and depositaries and were thereby distinguished from Appellant's case of a personal receiver who deposits his funds in a bank. (Page 11, Brief).

But outside of these technical distinctions, where one construction of the code section referred to would make this impounded money bear its just share of taxation, while another construction would cause it to escape taxation entirely, that construction of the statute should be adopted which will give effect to its manifest intent, namely, that money in litigation should be taxed. This we conceive to be in accord with the elementary rules of construction.

On page 10 of Appellant's brief it is stated that the deposits in Action No. 15344 were not even in possession of the Court. We controvert this statement by referring to the order quoted on page 10 of the record which states that the amount deposited in Suit No.

15344 can be withdrawn "only on a check, or checks, drawn by a special Master and signed by a judge sitting in this court." Our contention is further borne out by the form of orders of transfer set forth on page 13 of the Record, showing that the court has always treated the moneys impounded in this suit on exactly the same basis as those deposited in the others. Whatever may have been the wording of the original stipulation of the parties the court was not bound by it, and repeatedly exercised authority over the fund without reference to the parties.

The cases cited by appellant on pages 11, 12 and 13 of its brief have no application here. An assessment of personal property to any other than "to the person by whom it is owned or claimed or in whose possession or control it is," is of course a fatal defect—not, as appellant argues, because the name under which it is assessed is the material thing, but because the name serves to identify the owner. In *Lake County v. S. B. Q. M. Co.*, 66 Cal. 17, which appellant quotes at length, the court goes on to say (page 21) that if there had been anything in the record to show that Sulphur Bank Quicksilver Mining Company and Sulphur Banks Q. S. M. Co. were one and the same corporation the assessment would have been valid. In *San Luis Obispo v. Petit*, 87 Cal. 499, the assessor assessed the plaintiff in the case instead of the receiver and the assessment was held invalid. But in the matter at bar the identity of the authority in whose possession or control these funds were on the first Mondays in March of 1913 and 1914

is not in the least affected by the exact name of the agency of the court to which they were assessed. The funds were in the "control" of the court—that much the record shows clearly. Were it not for the provisions of Section 3647 they might have been assessed to the court in its official capacity. Under the provisions of that section they were assessed to the banks as "receivers or depositaries" of the court in the specified suits. No question of identity arises. No rights of appellant are infringed by this designation. Both the letter and spirit of Section 3647 are subserved by it. The assessment was valid.

As authority for our contention in respect to the assessment of funds in litigation, we cite the decisions in *Los Angeles v. Los Angeles City Water Co.*, 137 Cal. 699, where it was said:

"Under this section of the code (3647) the court was authorized to ascertain the amount of taxes to be paid, and to order that the tax be paid by the receiver, he being in possession of the fund; and the validity of such tax is not affected by the informality of the original assessment. (Pol. Code, Sec. 3885.) In each of the cases provided for in Section 3647 of the Political Code the right to tax 'money and property in litigation' does not depend upon the ownership of the money or property, nor the final result of the litigation, though the ultimate liability of the parties may depend, as between themselves, upon proceedings had after the payment of the tax."

In *People v. Lardner*, 30 Cal. 242, the funds in litigation were deposited with the County Treasurer

subject to order of the court. Suit was brought against him for taxes. It was held (page 244):

“The tax was properly assessed to the defendant as the person having the fund in possession (Act of 1861, Sec. 13, p. 422) and when levied it became a lien upon the fund in his hands. The fund was subject to payment of the tax under judicial direction.”

In the matters at bar, the banks instead of the County Treasurer, were the official agents designated by the court to receive the moneys in litigation.

B.

THE ASSESSMENT TO THE BANKS AS RECEIVERS AND DEPOSITARIES DOES NOT VIOLATE THE CONSTITUTIONAL PROVISIONS EXEMPTING BANKS FROM TAXATION EXCEPT ON THEIR CAPITAL STOCK FOR STATE PURPOSES.

Article XIII, Section 14 of the California Constitution provides as follows:

“The shares of capital stock of all banks, organized under the laws of this State, or of the United States, or of any other State and located in this State, shall be assessed and taxed to the owners or holders thereof by the State Board of Equalization, in the manner to be prescribed by law, in the city or town where the bank is located and not elsewhere. There shall be levied and assessed upon such shares of capital stock an annual tax, payable to the State, of one per centum upon the value thereof. * * *

This tax shall be in lieu of all other taxes and licenses, State, county and municipal, upon such shares of stock and upon the property of such banks, except county and municipal taxes on real estate and except as otherwise in this section provided."

Now, if this tax were one required to be paid by the banks out of their own income, the situation might be covered by the above constitutional inhibition against local taxation, and by the cases cited by appellant. Such, however, is not the case. The banks are assessed in their official capacity as receivers and depositaries of the court, a capacity which they assumed in fact, if not in form, when they accepted the deposit. The taxes to be paid are to be paid out of the deposit itself, thereby diminishing each bank's liability for the repayment of such deposit by the amount so withdrawn. The situation is very much the same as where any bank depositor is assessed for the amount of his credit at the bank and draws a check on his account to pay the tax. In this case the law (Pol. Code, Section 3647), provides that instead of levying the assessment against the court who is the real depositor, it shall be made against the banks in their official capacity as the agents of the court, and the tax paid upon order of the court out of the funds deposited. The principle is not disturbed by the fact that the dignity of the court is so respected at law that assessments can only be made to its subordinate agents and not upon the court itself. It is not contended that the moneys impounded herein are special deposits in the sense that

the money deposited may not be mingled with the general funds of the banks, but it is contended that the banks are merely the court's receivers, *de facto* if not technically, in the matter and have no discretion in the premises but to pay all or any part of the money so deposited to any person at any time upon an order of the court drawn in accordance with the form prescribed in the temporary restraining order under which the deposit was made. Such being the case how can it be said that these orders withdrawing a part of said deposit is a tax on the banks themselves merely because they are made payable to the Tax Collector? In brief, the banks are not concerned so long as the court makes the orders in due form. It may be observed moreover that the banks have not appeared in opposition to granting the order and alleged grounds of objection which affect only the banks' rights in the premises cannot, with propriety, be raised by appellant.

C.

The third specification of error made by appellant is based on its own opinion as to the manner in which the assessment should have been made.

It appears that the Assessor inadvertently included Suit No. 14275 in his list of cases in which the impounded moneys were assessed, whereas as a matter of fact, no money was impounded in Suit No. 14275. He also included Suit No. 26 in the list for the 1913 assessment, whereas that suit was not commenced until July, 1913, and hence no money was impounded

therein on March 1, 1913. But if no money was impounded in the last two cases no harm was done because none was assessed. The Assessor assessed to each bank the total amount on hand on the first Mondays in March of the respective years in all the cases (Tr. page 29). The total amounts on hand in the Mercantile Trust Company in the suits in which moneys were impounded (Tr. pages 16, 18) correspond exactly with the assessments to that institution (Tr. pages 27, 28). The same is true of each of the assessments to the other banks. The addition of suits numbered 14275 and 26 was mere surplusage and did not affect the validity of the assessment. Section 2885, Political Code, provides that "no assessment is illegal on account of informality".

Nor is the assessment void because the Assessor did not make a separate assessment for each suit to each bank but assessed the total amount on deposit for each year with each bank. The functions of the banks were identical in each case. The apportionment of the taxes, in case some suits should be won by appellant and others lost, is a mere matter of book-keeping. It is unnecessary to answer appellant's question propounded on page 17 of its brief because in this matter all the suits were in the same court, involving the same parties and the same remedy. The practice adopted by the Assessor greatly simplified the procedure in court and injured no one. Had he adopted appellant's suggested method we would have seventy appeals here instead of fourteen.

D.

For the reasons above stated, the court below did not err in directing payment of taxes in accordance with the gross amount assessed to each bank. The proper apportionment of the same is a bit of administrative detail which can be easily supervised by the court when a final disposition of the moneys impounded in any one or more of the suits is ordered.

E.

The fifth and last specification of errors raised by appellant is peculiar to the appeal in Case No. 2543. Referring to page 33 of the record we find a recital in the preamble to the correctory order made in this case by the court below, that the assessment was originally made to the Mercantile National Bank as receiver and depositary instead of to the Mercantile Trust Company as receiver and depositary. This error was due to an erroneous return made by the former institution (Tr., p. 28). Prior to the payment of taxes to the Tax Collector, however (Tr., page 34), the assessment was corrected on the books by the Assessor and the taxes were paid by the Mercantile Trust Company in compliance with the order drawn on the Mercantile National Bank. Then, in order to correct the informality in the original order, the court made an order correcting the same *nunc pro tunc*, and confirming and approving the payment by the Mercantile Trust Company of the taxes which at the time of said payment appeared on the assessment rolls to

have been assessed to it—as receiver and depositary, of course (Tr. pp. 33-35).

To the foregoing error and correction appellant takes vigorous exception. Proceeding on the same theory as before, appellant contends that the name of the receiver or depositary is the all important thing. If this were an assessment against the Mercantile National Bank as an individual, and the name had been subsequently changed in the manner indicated to Mercantile Trust Company we would readily concede the right of the latter company to protest the assessment. But such was not the case. This was an assessment of moneys in the hands of a court to a receiver *de facto* of that court in its official capacity. The individual name of the receiver sinks into secondary significance as compared with its official designation. The error is corrected. There is nothing in the record to show that the Assessor did not make the correction in the manner provided by law. It must therefore be presumed that he did. The bank that should have been assessed accepts the corrected form of assessment and pays the tax. The court corrects the order *nunc pro tunc* so as to conform with the facts. How, we ask, has appellant been injured? We think counsel has overlooked the spirit of the law in his zeal for the observance of its letter.

CONCLUSION.

The funds on deposit were, so far as the taxation law is concerned, the property of neither the appellant nor the ratepayers of San Francisco, on the

dates at which they were assessed. They were subject to the control and administration of a court of equity alone. They had escaped taxation for the year 1913. They were not taxable to any person as owner in 1914. Unless they were treated and assessed as "money in litigation" under authority of Section 3647 in 1914, they were bound to escape taxation entirely. They were accordingly assessed, as "money in litigation" to the only parties to whom they could have been assessed under the provisions of said code section, and in compliance with Section 3649, the assessment was made for both years. The court below after considering the question on equitable grounds saw fit to overrule appellant's objections to the validity of the assessment, all of which were based on purely technical reasoning, and ordered the taxes paid out of the funds in question. In so doing it followed exactly the course that any private person owning property would have been compelled by law to follow. The remedies which would have been open to such private owner are still open to appellant—to have the payment made under protest by the banks as receivers and depositaries and, (with permission of the court below), bring suit against the City and County in the proper jurisdiction, in the names of the receivers and depositaries, where the technical questions involved may be adjudicated on issues definitely raised. Furthermore, it is submitted that none of appellant's technical objections are well taken, but that the spirit of the law has been observed in every case.

For these reasons we contend that the discretionary powers of the court below have not been exceeded and that the orders should be affirmed.

Respectfully submitted,

Percy G. Long
City Attorney.
Robert M. Scott

Assistant City Attorney.

Solicitors for Appellees.

Dated March 15, 1915.

Nos. 2543, 2547, 2548, 2549, 2550, 2551, 2552, 2553,
2554, 2555, 2556, 2557, 2558, 2559

IN THE
United States Circuit Court of Appeals

For the Ninth Circuit

SPRING VALLEY WATER COMPANY

(a corporation),

Appellant,

vs.

CITY AND COUNTY OF SAN FRANCISCO

(a municipal corporation) and TAX COL-
LECTOR of said City and County,

Appellees.

REPLY BRIEF FOR APPELLANT.

EDWARD J. MCCUTCHEN,

A. CRAWFORD GREENE,

Solicitors for Appellant.

MCCUTCHEN, OLNEY & WILLARD,

Of Counsel.

Filed

MAR 26 1915

Filed this.....day of March, 1915.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.



Nos. 2543, 2547, 2548, 2549, 2550, 2551, 2552, 2553,
2554, 2555, 2556, 2557, 2558, 2559

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(a corporation),

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vs.

CITY AND COUNTY OF SAN FRANCISCO

(a municipal corporation) and TAX COL-
LECTOR of said City and County,

Appellees.

REPLY BRIEF FOR APPELLANT.

We desire to avail ourselves of the permission granted by the court at the oral argument of these appeals to answer the following portions of respondents' brief not specifically considered in our opening brief:

(1) The court did not violate equitable discretion in ordering the payment of taxes (respondents' brief, pp. 7 and 8).

(2) The assessment was made in accordance with Section 3647 of the Political Code (respondents' brief, pp. 9-14).

(a) THE EXERCISE OF THE COURT'S DISCRETION.

Counsel for respondent thus state their contention:

“In making the orders appealed from, the court below did not necessarily pass on the validity of the assessment. While we admit that the orders made are appealable orders as they finally dispose of the matter so far as the court below is concerned, they were orders made in the exercise of equitable discretion, and we believe that this court should go no further than to determine whether such discretion was exceeded.”

They further state that, in the case of an ordinary receivership, where the receiver was in doubt as to whether the taxes were validly assessed or not, he would pay the taxes under protest and, by leave of court, bring a separate action for their recovery; that complainant may sue in the name of the depositaries in the state courts to recover taxes paid under protest; and that the lower court is justified in requiring complainant to pursue its remedy in the same manner that it would have been forced to follow had it been invested with possession and control of the property.

We think counsel have neither accurately stated the rights of appellant nor fully appreciated the obligations of the lower court. The impounded money was deposited subject to two conditions: It was to be repaid to complainant if the actions instituted by complainant were ultimately determined to be well founded, and to the ratepayers if judgment was given in favor of the city; and the fund could only be disbursed on checks drawn by the special master and countersigned by a federal judge. There was no “twilight zone” for the

exercise of discretion. The court could not consider questions of public policy or expediency. It could, at the most, order a valid charge against the fund paid and, unless it determined that such a charge was valid, it was not empowered to direct the distribution of the fund. Its plain duty was to keep the fund intact, and the orders of the lower court can only be upheld if the taxes were validly assessed.

For this reason the other arguments of counsel, even if they were valid, would work no change in the duty of the court. They are not, however, valid. Where a receiver, for instance, is directed to pay a tax against property in his custody, he could not, without stultifying the court of which he is an officer, pay them under protest. Could a court justify its action in directing payment and, at the same time, direct its own representative to contest the correctness of its own determination?

That in making the order herein considered the lower court did not make such provision is surely a sufficient answer in the present case.

Counsel, upon reflection, will, we think, agree with us that their further suggestion that appellant might sue in behalf of the depositaries to recover taxes paid under protest is entirely without foundation. What right has appellant to commence such an action when it did not personally pay the taxes and has no relation whatever with the depositaries with which the funds were impounded? How can it enforce the payment of such taxes by the bank under protest? In neither respect has it rights which it may assert. Appellant's relief must be had from the court whose protection it

sought. It cannot get it elsewhere, and it is submitted that, in making the orders complained of, the court should have passed, and necessarily did pass, upon the validity of the assessments, and that it was only empowered to distribute the funds as it did, if the assessments were legally made.

We are thus brought to the second point to be considered in this brief.

(b) THE ASSESSMENTS WERE NOT MADE IN ACCORDANCE WITH SECTION 3647 OF THE POLITICAL CODE.

Counsel concede that the assessments were invalid unless they were made in accordance with the provisions of the above section. They assert that the assessments were so made because the banks, while not actual receivers, were *de facto* receivers in the various actions. We do not appreciate the exact distinction counsel seek to draw between actual and *de facto* receivers. They concede that the actions in which these appeals were prosecuted were not of such an impression that the appointment of an "actual" receiver would be warranted or could be upheld; that the court's officer is its special master, appointed by it; that the relation between the banks and the court is purely that of depositor and depository; that no order appointing the banks receivers was ever made. But, they nevertheless persist in the contention that the banks are receivers. They concede (brief, p. 15) that "the situation is very much the same as where any bank depositor is assessed for the amount of his credit at the bank and draws a check on his account to pay the tax". But they insist that such

a relationship constitutes the bank a receiver. It is not disputed that no one of the requirements for the appointment of a receiver, as set forth in the statute law of California, or as applied by the federal courts, has been made to appear. No bond was, for instance, furnished by any one of the banks. No administrative duties of any sort were either imposed upon the depositaries or accepted by them. If such a relationship warrants a court in determining that the depositaries are receivers, it is, indeed, worthy of note that no decision to that effect will be found in any of the authorities, and that no suggestion of the sort has ever heretofore been advanced. It is submitted that it would be stretching the language of Section 3647 and the action of the parties and of the lower court beyond the breaking point to designate the depositaries in this case receivers.

It is further urged (brief, pp. 11, 12, 13) that, in making the assessment, a misnaming of the person referred to in Section 3647 would have no effect upon the validity of the assessment, and we understood counsel, at the oral argument, to go to the full length to which his argument necessarily carries him, and to contend that there was no need of designating any one, and that a reference to the fund would be sufficient. It requires no more than a reference to the section in question to show the fallacy of this contention. It is there provided:

“Money and property in litigation, in possession of a county treasurer of a court, county clerk, or receiver, must be assessed to such treasurer, clerk, or receiver, and the taxes be paid thereon under the direction of the court.”

In other words, if the fund is in possession of a county treasurer, it must be assessed to him, or, if a county clerk, to him; and it is plain that a failure to follow these specific instructions renders the assessment void.

City of San Luis Obispo v. Pettit, 87 Cal. 499.

It is our opinion that the section herein considered was not intended to cover funds in litigation in the federal courts. The phraseology of the statute seems to us to indicate that it was money in litigation in the state courts which it was intended to reach. Doubtless the observance of rules of comity dictated this distinction. Whether this is so or not, the most that can be claimed for the section is that it does not clearly cover the present situation. Since this is so, we are plainly entitled to invoke the rule so often laid down and applied in the federal and state courts, that tax proceedings are *in invitum* and, that unless the sovereign expresses "its intention to tax in clear and unambiguous language", the doubt will be resolved in favor of the taxpayer. It was, for instance, said in

Eidman v. Martinez, 184 U. S. 578, 583; 46 L. Ed. 701:

"It is an old and familiar rule of the English courts, applicable to all forms of taxation, and particularly special taxes, that the sovereign is bound to express its intention to tax in clear and unambiguous language, and that a liberal construction be given to words of *exception* confining the operation of duty (citing cases).

"We have ourselves had repeated occasion to hold that the customs revenue laws should be liberally interpreted in favor of the importer, and that

the intent of Congress to impose or increase a tax upon imports should be expressed in clear and unambiguous language.”

Respondents' discussion of the other points urged in our opening brief require no additional consideration by us here.

It is respectfully submitted that the orders should be reversed.

Dated, San Francisco,

March 22, 1915.

EDWARD J. McCUTCHEN,

A. CRAWFORD GREENE,

Solicitors for Appellant.

McCUTCHEN, OLNEY & WILLARD,

Of Counsel.

No. 2544.

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit.

WILLIAM RAYMOND,

Plaintiff in Error,

VS.

CHICAGO, MILWAUKEE & ST.

PAUL RAILWAY COMPANY,

Defendant in Error.

Filed

MAY 6 - 1915

F. D. Monckton,
Clerk.

BRIEF OF DEFENDANT IN ERROR

*Upon Writ of Error from the United States Dis-
trict Court for the Western District of
Washington, Northern Division.*

HONORABLE JEREMIAH NETERER, *Judge.*

GEO. W. KORTE,

Attorney for Defendant in Error,

608 White Building, Seattle, Wash.

Filed this..... day of May, 1915.

..... Clerk

By..... Deputy.

No. 2544.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

WILLIAM RAYMOND,

Plaintiff in Error,

vs.

CHICAGO, MILWAUKEE & ST.

PAUL RAILWAY COMPANY,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR

Upon Writ of Error from the United States District Court for the Western District of Washington, Northern Division.

HONORABLE JEREMIAH NETERER, *Judge.*

STATEMENT OF THE CASE.

Plaintiff in error filed a complaint in the District Court, charging that he was an employe of the defendant in error, and, at the time of his alleged injury, engaged in certain work which he claimed was work constituting interstate commerce. He sought by such allegations to bring himself within the protection of the Federal Employers'

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Liability Act. The specific charge made is found in paragraph three of the complaint, as follows:

"That on or about the 16th of April, 1914, the defendant was engaged in straightening out its main railroad line and cutting down the grades thereon so as to better facilitate the movement of interstate and foreign commerce between said City of Seattle in the State of Washington, and said City of Chicago in the State of Illinois, and other cities and states, and at said time plaintiff was employed by the defendant in said work of *driving a tunnel* to improve and better the roadbed between Horrock's Spur and Rockdale, on the defendant's main railroad line, and at said time and place and by said work, the defendant was engaged, and plaintiff was employed by said defendant in the work of improving, altering, repairing, straightening out, and bettering the roadbed, and cutting down the grades on the defendant's said railroad, so as to facilitate and make less difficult and expensive and more easy, secure, expeditious and efficient, the operation of freight and passenger trains on the defendant's said railroad line in the carriage of both passengers and freight in interstate and foreign commerce and the work of defendant, the plaintiff's labor thereon were acts and things incident to and made necessary for the constant, continuous and better operation of defendant's said trains in the carrying on of its business of interstate commerce by railroad and in work incident to such commerce and as a necessary part thereof."

Defendant in error filed its answer and denied the facts as claimed in said paragraph, as not being the true facts of the plaintiff's real employment, except the "work of driving a tunnel." In its answer the defendant in error set forth in full and in detail, the particular work which plaintiff in error was, at the time of his alleged injury, per-

forming, which facts showed that the work was solely the construction of a tunnel through the Cascade Mountains, wholly unfinished, located off the main line of the railroad and entirely disconnected therefrom, and in no manner interfering with the operation of commerce over the main line of railroad. It pleaded that the construction of said tunnel could not physically interfere with any commerce carried by the defendant in error on its main line, for the very reason that the location and the boring of the new tunnel was away from any point of connection with the main line, and, on account of being in process of construction, trains could not physically pass through, no completed hole having been bored through the mountains.

The ultimate facts set forth by the defendant in error in its second affirmative defense, state the true situation thus:

“That it is a common carrier corporation, engaged in interstate and intrastate commerce with a line of railroad running from the City of Chicago in the State of Illinois to the City of Seattle in the State of Washington; that the said main line of railroad across the State of Washington was constructed in the year 1908, and its route crossed, and now crosses, the Cascade Mountains, through and over what is known as the Snoqualmie Pass, and is constructed on the summit of said mountains or pass without the aid of a tunnel and no tunnel of any consequence exists along the line of the said railroad of said defendant as it passes over the Cascade Mountains in King County, Washington, where the alleged accident to the said plaintiff occurred; that the said railroad over said mountains

has been in operation as a through highway of interstate commerce since the year 1908 and is now in continuous operation as such; that in the year 1913 this defendant commenced the construction of a tunnel through the Cascade Mountains, the location of which tunnel is off the main line of defendant's railway and wholly disconnected therefrom, and the work of constructing said tunnel in no manner impedes, stops or interferes with the operation of the defendant's trains engaged in interstate commerce over and along its present main line of railroad; that the exact location of said tunnel is shown upon a blueprint map and survey thereof hereto attached and marked "Exhibit A" as part of this answer; that the entire length of said tunnel through said mountains, when completed, will be about fourteen thousand feet, and the outside boundaries thereof are, on said blueprint, between the points East Portal and West Portal; that the means used by the said defendant in the construction and boring of said tunnel are those ordinarily employed in tunnel work, to-wit, boring, blasting, pick and shovel work, and the carting of the material from the hole by means of dump cars hauled by mules or horses; that said plaintiff, at the time of his said alleged injury, was working as a common laborer with a pick and shovel within said partially bored tunnel, in connection with loosening of earth and rock and material, for the purpose of carrying or carting the same from the partially bored hole of said located tunnel; that he was at said instant of time working in the east end of said located tunnel, which, at that time, was bored into the mountain about one thousand feet; that at the point in the bore of said tunnel where plaintiff was working and where he received his injury, and in all other parts thereof, there was no railway track or track for the carriage of interstate commerce or commerce of any kind, constructed, and no railway engaged in any kind of commerce operated into said bore of the tunnel or up to the place where said

plaintiff worked and where he received the alleged injury; that the reason why no commerce of any kind was carried on at the point where plaintiff worked and where he received his alleged injury, or at any other point connected with the boring of said tunnel, was, that said tunnel was incomplete for any service which might or could be performed by the operation of a railroad; that it was in the process of construction, being only partially bored into said mountain, making it physically impossible for any train, cars or engines to operate into the said partially bored tunnel; that the sole employment of the said plaintiff with the said defendant and the whole work that he performed while in its employ, was that of a common laborer with pick and shovel, in assisting the boring or driving of the said located tunnel.

That said tunnel is as yet and down to this date far from completion for the operation of trains carrying commerce through the same; that when the same is completed it will be a part of defendant's said main line of railroad between Seattle, Washington, and Chicago, Illinois, defendant will construct a railway track through the same and will operate trains thereover and will, by means of said trains carry freight and passengers from the State of Washington to other states and from other states through the State of Washington to the City of Seattle and other points bordering on Puget Sound."

By way of a special plea to the jurisdiction of the court to hear and determine the controversy set forth in the pleadings, the defendant in error pleaded in its answer, as a third affirmative defence, that the particular work being done by the defendant in error, at the time of the alleged accident to the plaintiff in error, was such as was embraced within the Washington State Compensa-

tion Act then in force (Chap. 74, Laws of 1911), and that the plaintiff in error, at said time, was an employe embraced within the State Act, which Act is exclusive of all the common law or statutory remedies for the recovery of damages for personal injuries; that the plaintiff in error being embraced within the State Act, and the defendant in error, on account of the particular tunnel work being carried on, being likewise embraced within said Act, plaintiff's sole remedy for his alleged injury is through the provisions of the State Compensation Act, and, on account thereof, this action, alleged to be based on the Federal Employers' Liability Act, could not be maintained.

In reply to the facts set forth in the second affirmative defense by the defendant in error, in which it set forth the particular work being carried on by the plaintiff in error at the instant time he received his alleged injury, the plaintiff in error, by specific plea, admitted the ultimate facts, and admitted the location of the tunnel as shown on the blue print attached to the answer of the defendant in error; he then further stated in the plea that he "denies that the said matter set forth in said second affirmative defense constitutes any defense to the plaintiff's said cause of action stated in his said complaint." This last denial, of course, is no denial of any fact and is a mere statement of a legal conclusion.

In answering the plea of jurisdiction of the defendant in error, the reply of the plaintiff in error

likewise admitted the facts therein set forth, but "plaintiff denies that the said matter constitutes any defense to plaintiff's said cause of action stated in his said complaint, and plaintiff denies that such compliance with said laws and the payment by the defendant of the assessments thereunder, for the particular tunnel work in question, is any defense to the cause of action set forth in the complaint."

Thereafter, the defendant in error filed a motion for judgment on the pleadings, for the reasons:

(a) That it affirmatively appears from the admitted allegations of the complaint, the answer and the reply, that plaintiff has based his alleged cause of action upon the Act of Congress of April 22nd, 1908, and the amendments thereto, commonly known as the Federal Employers' Liability Act, and that the said plaintiff, at the time he received his alleged injury, was not employed, or engaged in interstate commerce, or performing a service of interstate commerce, so as to bring him within the terms of said Congressional Act and make defendant liable for his alleged injury;

(b) That the court is without jurisdiction of the subject matter of this action, on account of the Act of the Legislature of the State of Washington (Chap. 74, Laws 1911), relating to the compensation of injured workmen engaged in tunnel work, now in force in this State.

This motion was sustained and judgment was entered for the defendant in error, dismissing the

action out of court. This judgment necessarily resulted from the admitted facts set forth in the answer under the special defenses two and three.

ARGUMENT.

In construing the pleadings, the Court will, of course, strip the pleading of every conclusion of law and of every conclusion of fact which does not amount to the statement of an ultimate fact (*Straus vs. Foxworth*, 231 U. S. 162, 168).

It being admitted by the pleadings that the defendant in error was at the time complying with the Washington State Compensation Act, and that the particular tunnel work is such work as is embraced within that Act, it follows that whatever common law right plaintiff in error may have had to recover damages for his alleged injuries, has been taken away from him. Therefore, unless plaintiff in error can sustain his claim that he was a federal employe embraced within the Congressional Act, and not an employe over whom the State of Washington had jurisdiction, he has no direct cause of action against the defendant in error for his alleged injuries. His sole relief is through the remedy provided by the State Compensation Act.

So reduced, the sole law question involved is, whether a laborer engaged in boring a tunnel for the construction of a railroad through it, which, when completed, will be used to move interstate

commerce, is, by reason of such construction work, engaged in interstate commerce so as to bring him within the protection of the Federal Employers' Liability Act relating to the employes of interstate railroads.

We are convinced that the Supreme Court has made it plain in the *Second Employers' Liability Cases* (223 U. S. 1), the *Pederson Case* (229 U. S. 146), and the *Behrens Case* (233 U. S. 477), that a line of demarcation between federal and state employes connected with an interstate railroad must be drawn and definitely settled. In those cases we maintain that the line was finally laid out between the work of constructing the instrumentalities to be used in interstate commerce and the repair and up-keep of those instrumentalities after they had been put to actual use by the interstate railroad in moving interstate commerce. Otherwise, if no division point were made, the Act would embrace "all of the activities in any way connected with trade between the states and exclude state control over matters purely domestic in their nature," (*Hooper vs. California*, 155 U. S. 648, 655), and the Act would fall for the reasons asserted in the *First Employers' Liability Cases*, 207 U. S. 463.

Unless the line is drawn as pointed out by the Supreme Court, it is manifest that it would include not only those who are employed in commerce, but also those engaged in other departments of business. For instance, if it included workmen engaged

in the construction of things which would thereafter be used to move interstate commerce, it would cover employes laboring upon the construction of an engine. It would include the employe whose inventive genius devised an engine superior in quality to any yet in use; the man who built the parts to fit the ideas of the inventor; the man who tested out the engine to see whether it would perform the work intended for it,—all of which would precede the actual turning over of the machine to the railroad company desiring it to facilitate the movement of the interstate commerce then being carried by an inferior engine. It would similarly include those connected with constructing a better box car, a more commodious sleeper, or more fascinating dining car, intended to improve the service or facilitate the movement of interstate commerce. It will hardly be contended that any of the instances we have just enumerated are in any manner connected with interstate commerce. We are unable to perceive how the boring of a tunnel is any different from the construction of a new engine, a new box car, or any other new vehicle which may be manufactured by some independent corporation and sold to an interstate railroad company. Suppose the plaintiff in error, instead of being engaged in boring the tunnel, was laboring upon the construction of a new type of engine which would be so powerful that it could climb the mountains without the reduction of a grade and thereby obviate the boring of any tunnel through the mountains;

and, while so engaged upon the construction of this monster, he was in a building located where this tunnel was being bored (off from the line of railroad where it could not block the movement of commerce), would the plaintiff in error contend that because such engine was being especially made to obviate grades and tunnels, to facilitate the movement of commerce, although not yet in use as such, constituted an instrument of interstate commerce? Now, this engine would accomplish the very thing which counsel claims that the unfinished tunnel would accomplish when completed and trains move through it.

The illustration given is as sensible as counsel's fantastic notion of the unfinished tunnel.

In the case of *Pederson vs. Ry. Co.*, 229 U. S. 146 at 152, the Supreme Court points out the line of demarcation thus:

"The true test always is: Is the work in question a part of the interstate commerce in which the carrier is engaged?

Of course, we are not here concerned with the construction of tracks, bridges, engines or cars which have not as yet become instrumentalities in such commerce, but only with the work of maintaining them in proper condition after they have become such instrumentalities and during their use as such."

The foregoing statement relating to the construction of tracks, bridges, engines or cars, is made more significant in the light of the dissenting opinion filed in that case. The dissenting opinion applies a strict construction to the statute and main-

tains that only those employes directly connected with the transportation of interstate commerce, are embraced within the Act. Justice Lamar, who wrote the dissenting opinion, insisted that the line should be drawn between the employes actually moving the commerce and the employes engaged in other departments of the railroad's business, and, to support his construction of the statute, he makes the following observations:

"It is conceded that a line must be drawn between those employes of the carrier who are employed in commerce and those engaged in other departments of its business. It must be drawn so as to take in, on one side, those engaged in transportation, which is commerce; otherwise, there is no logical reason why it should not include every agent of the Company; for there is no other test by which to determine when he must sue under the state statute and when under the Act of Congress; for, if a man on his way to repair a bridge is engaged in interstate commerce, then the man in the shop who made the bolts to be used in repairing the bridge, is likewise so engaged. If they are, then the man who paid them the wages and the bookkeeper who entered those payments in the accounts are similarly engaged; for they are all employed by the carrier at the work. Each contributes to its success in hauling freight and passengers."

Counsel for plaintiff in error contends that the Supreme Court in rendering the opinion in the *Pederson* case, misunderstood the facts, but we are content with the statement that the Supreme Court was fully aware of all the facts involved in the case when the opinion was written.

In the case of *Illinois Central R. R. Co. vs.*

Behrens, 233 U. S. 473 at 478, the Supreme Court specifically ruled that it makes no difference whether the employe, immediately prior to the accident, was helping to move interstate commerce, or whether immediately thereafter he would be engaged in moving interstate commerce; and it applied the test laid down in the *Pederson* case, *supra*, namely, that, at the instant time of the accident, the employe must be performing a service in interstate commerce and not in intrastate commerce or other work which would not be commerce. To make it plain, the Court said:

“Here at the time of the fatal injury, the intestate was engaged in moving several cars, all loaded with intrastate freight, from one part of the city to another. That was not a service in interstate commerce and so the injury and resulting death were not within the statute. That he was expected, upon the completion of that task to engage in another which would have been a part of interstate commerce, is immaterial under the statute, for by its terms the true test is the nature of the work being done at the time of the injury.”

Paraphrasing the last sentence to fit the case at bar, it would read thus: “That the tunnel was expected, upon its completion, to be used in interstate commerce, is immaterial under the statute.” This answers every contention of counsel that the tunnel in question was being bored for the purpose of avoiding a mountain grade, snow slides and other visitations of nature.

In *Lamphere vs. Ry. Co.*, 196 Fed. 432, this

court laid down the practical test in the following language:

"The test question is: 'What is the effect upon interstate commerce (of employe's death)? Does it have the effect to hinder, delay or interfere with such commerce? Was the relation of the employment of the deceased to interstate commerce such that the personal injury to him tended to delay or hinder the movement of a train engaged in interstate commerce?'"

Counsel, to make his case fit the foregoing test, makes this astounding statement:

"Suppose the trains were stopped until this work was completed waiting for its completion? Would any one then say that plaintiff was not engaged in interstate commerce? This is the real situation with regard to the tunnel in question, as shown by the statements we have quoted from the Superintendent. The commerce over the mountains was not only slow, tedious and expensive but at times the defendant was unable to carry it on, waiting all the time for the completion of this tunnel."

Of course, if the trains were stopped waiting for the tunnel to be completed, the railroad would not be engaged at all in interstate commerce or any commerce. Why would the railroad stop its trains to wait until this tunnel was bored when it had built its line and had been operating it for years before the construction of the tunnel was begun? The blue print shows that it has a line of railroad in full operation over the mountain without a tunnel. Such unreal illustrations prove

nothing in favor of the proposition urged.

Further, counsel should point out to the court which portion of the pleadings contains the alleged statement of the superintendent. It is not in the answer of the defendant in error and it cannot be found in either the complaint or the reply of the plaintiff in error.

In *Jackson vs. C. M. & St. P. Ry. Co.*, 210 Fed. 495, the District Court had before it the identical claim made by the plaintiff in error in this case. The court ruled that the work of constructing the tunnel, which was in an unfinished state, was not the work of moving interstate commerce and that the plaintiff had no right to recover.

In *Bravis vs. C. M. & St. P. Ry. Co.*, 217 Fed. 234, the Eighth Circuit Court of Appeals ruled that an employe engaged in the construction of a bridge six hundred feet distant from a railroad, on a cut-off more than a mile in length, which had never been provided with rails or used as a railroad, is not employed in interstate commerce, although his employer is so engaged and intends to use the cut-off therein when completed. It bases its opinion upon *Pederson* case, *supra*; *Wabasha R. R. Co. vs. Hayes*, 234 U. S. 86, and the case of *Jackson vs. Ry. Co.*, *supra*.

In *Thomas vs Boston & Maine R. R.*, 218 Fed. 143, the District Court for the District of New Hampshire, held that an employe who was injured by a falling timber while engaged in tearing down

part of a railroad round house which had been rendered useless by fire, was not performing a service of interstate commerce at the time of his injury. This case was reversed by the Circuit Court of Appeals (219 Fed. 180) upon the ground that the District Court had misconstrued the language of the declaration, and held that the declaration set forth facts which showed that the round house was only partially damaged and the damaged portion was being removed for the purpose of reconstruction and to put the round house in the condition it was in before the fire, so that it could again be used to house the engines moving interstate commerce.

In *United States vs. C. M. & P. S. Ry Co.*, 219 Fed. 632, Judge Diedrich, of the Idaho District, held that an Engineer assigned to duty on an engine hauling a work train engaged in filling a bridge on defendant's interstate line for an uninterrupted period of fifty-one days, was not, while performing such service, connected with the movement of a train hauling interstate commerce. In support of its contention, the Government relied upon *Johnson vs. Southern Pacific Railway Company*, 196 U. S. 1, which case holds that a dining car resting and in waiting to be attached to a train moving in interstate commerce, is still an instrument of such commerce. The District Court, distinguishing that case, reasoned as follows:

"Crown was not on the 31st day of October waiting to be called on an interstate trip. So far as

appears, the defendant never expected to call him, and he never expected to be called, on an interstate trip. Whether he would ever go upon such a trip depended upon several contingencies. Suppose that in the *Johnson* case the facts had been that the dining car in question had once been used in interstate commerce, but that it had been set aside for an indefinite period for intrastate service and had been used exclusively for such service for several weeks, and was at the time its condition was called in question, being so used, and was waiting for an intrastate, not interstate, train to be made up, to which it was to be attached, and that there was no present intention of withholding it from intrastate service. Surely both the reasoning and the conclusion must have been different. This is not a case where there was a commingling of service, where the employe was one hour or one day operating in interstate and another hour or another day operating in intrastate commerce; nor is it a case where, though not in a literal sense actually engaged in moving an interstate train, the employe 'stands and waits' to actually engage in such service. If the contention of the Government is correct, an employe who has once rendered service such as is covered by the Act, must always be deemed to be within the provisions thereof, regardless of the time which has elapsed since he ceased to render such service; at least, so long as he remains in the employ of the same company."

And such is the reasonable construction of the Act by the Courts dealing with facts similar to those at bar. (*Norgard vs. Ry.*, 218 Fed. 773 (C. C. A.); *Ry. vs. Glenn*, 219 Fed. 148 (C. C. A.); *Gray vs. Ry.*, 142 N. W. 505 (Wis.); *Ry. vs. Moore*, 156 Ky. 708; *La Casse vs. Ry.*, 64 Southern, 1012 (La.).

We are unable to distinguish between the con-

struction of a tunnel and the construction of any other instrument which might, after its completion, be used in interstate commerce. If we are correct, the plaintiff in error was not, at the time he received his injury, performing a service in interstate commerce, and therewore has no right to recover under the Federal Employers' Liability Act. Not having such right, his sole remedy, as pleaded by the defendant in error in its answer, is, the compensation allowed to him under the provisions of the Washington State Compensation Act. The judgment of the District Court should be affirmed.

Respectfully submitted,

GEO. W. KORTE

Attorney for Defendant in Error,

608 White Building,

Seattle, Wash.

United States
Circuit Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,
Appellant,
vs.

WILLIAM L. SASSAMAN, Claimant of the Gasoline Launch "CALYPSO," Her Boats, Tackle, Apparel, Furniture and Cargo,
Appellee.

Apostles.

Upon Appeal from the United States District Court for
the Northern District of California,
First Division.

Filed

FEB 5 - 1915

F. D. Monckton,
Clerk.

United States
Circuit Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

WILLIAM L. SASSAMAN, Claimant of the Gasoline Launch "CALYPSO," Her Boats, Tackle, Apparel, Furniture and Cargo,

Appellee.

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the Northern District of California,
First Division.

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*In the District Court, First Division, United States,
Northern District of California.*

No. 15,522.

THE UNITED STATES

vs.

Gasoline Launch "CALYPSO," etc.

Praecipe for Record on Appeal.

The Clerk of said Court will make a Transcript of Record in above-entitled case, on appeal, including the following papers:

Stipulation and Order Concerning Original Exhibits;

Amended Answer of Wm. L. Sassaman and Wm. H. Singleton;

Answer of Los Angeles Creamery Company and Petition in Intervention;

Order Modifying Order as to Custody of Launch, etc.;

Temporary Restraining Order;

Order Allowing withdrawal of Exhibits;

Notice of Appeal;

Assignment of Errors;

Final Decree of Forfeiture;

Report and Findings of Fact of U. S. Commissioner;

Answer of Wm. L. Sassaman and Wm. H. Singleton;

Claim of Wm. L. Sassaman and Wm. H. Singleton;

Claim of Los Angeles Creamery Co.;

Opinion and Order to enter Decree condemning the interest of Pettinger only, and such interest to be sold free of encumbrance or lien;

Libel of Information;

Deposition of Witnesses, R. M. Smith, Wm. L. Sassaman and Geo. E. Platt;

Exceptions and Amendments to Exceptions to Commissioner's Report;

Claimant's Exhibit "A";

Claimant's Exhibit "B"; Libelant's Exhibits 2, 4, 5 and 6. [1*]

Deposition of Witnesses A. J. Stoecklin, Morris Pettinger, Louise E. Grimaud, Geo. E. Platt, and William L. Sassaman;

Depositions of Harry B. Blee et al., taken before U. S. Comr. Krull.

This 9th day of December, 1914.

JNO. W. PRESTON,

U. S. Attorney.

[Endorsed]. Filed Dec. 9, 1914. W. B. Maling, Clerk. By T. L. Baldwin, Deputy Clerk. [2]

In the District Court of the United States, in and for the Northern District of California, First Division.

IN ADMIRALTY.

THE UNITED STATES OF AMERICA

vs.

The Gasoline Launch "CALYPSO," Her Boats, Tackle, Apparel, Furniture, and Cargo.

*Page-number appearing at foot of page of original certified Record.

Libel of Information.

To the Honorable Judges of the District Court of the United States, in and for the Northern District of California:

The Libel of Information of John W. Preston, Attorney of the United States for the Northern District of California, who prosecutes on behalf of the United States, and being present in court in his proper person, in the name and behalf of the said United States, against the gasoline launch "Calypso," her boats, tackle, apparel, furniture and cargo, and against all persons intervening therein, in a cause of forfeiture, alleges and informs as follows:

I.

That the said vessel known as the gasoline launch "Calypso," her boats, tackle, apparel, furniture and cargo, being the property of some person or persons to the said attorney of the United States unknown, was seized by certain officers of Immigration of the United States in the harbor of Monterey in the State and Northern District of California, and within the admiralty and maritime jurisdiction of the United States, and of this Honorable Court, where she is now in the custody of the said United States Immigration officers at Monterey, in the County of Monterey, State and District aforesaid, as forfeited to the United States, for the following, among other causes: [3]

II.

That on the 16th day of January, 1914, the said gasoline launch "Calypso" arrived in the United

States at the port of Monterey, in the State and Northern District of California, from a foreign port or place, to wit, from Ensenada, in the Republic of Mexico, or from some other foreign port or place to the said attorney of the United States unknown.

That at the time and place at which said gasoline launch arrived in the United States as aforesaid, one Morris Pettinger was in and on board of said vessel and was acting as the master thereof.

III.

That at the time and place at which said vessel arrived in the United States as aforesaid, as the said Morris Pettinger, master as aforesaid, then and there well knew, there were in and on board of said vessel certain Chinese passengers, to wit, eighteen Chinese passengers.

IV.

That said Morris Pettinger, so being such master of said vessel as aforesaid, did knowingly and wilfully fail, neglect and refuse to deliver a manifest, or any manifest of the cargo of said vessel, pursuant to law, and did knowingly and wilfully fail, neglect and refuse to make a report, or any report, of the entry of said vessel pursuant to law.

V.

That the said Morris Pettinger, so being such master of said vessel as aforesaid, did knowingly and wilfully fail, neglect and refuse at any time or at all, to deliver and report, or deliver or report to the Immigration Inspector, Wm. H. Chadney, in charge of the district in which such vessel had arrived, before landing or [4] permitting to land, any Chinese

passengers from said vessel, a separate list, or any list, of all or of any Chinese passengers taken on board the said vessel at any foreign port or place, and a list of all or any such passengers on board the vessel at the time of her arrival in the United States as aforesaid, or either or any of such lists, in violation of the provisions of section 8 of the Act of Congress of May 6th, 1882, as amended by the Act of Congress of July 5th, 1884.

VI.

That the said Morris Pettinger, so being such master of said vessel as aforesaid, on said 16th day of January, 1814, did knowingly and unlawfully allow eighteen certain Chinese passengers, the names of which are to the said attorney of the United States unknown, to land in the United States from said vessel, in violation of law, and before the Chinese Inspector in charge if the district in which said vessel had arrived, or his deputy, or any other proper officer of the United States, had proceeded to examine such passengers or any of them, touching their right to be allowed to land in the United States in violation of the provisions of section 9 of the Act of Congress of May 6th, 1882, as amended by the Act of Congress of July 5th, 1884.

VII.

That the said Morris Pettinger, so being such master of said vesel as aforesaid, did unlawfully, wilfully and knowingly aid and abet the landing in the United States from said vessel, of eighteen certain Chinese passengers, the names of whom are to the said attorney of the United States unknown, who

were not legally entitled to enter the United States because they had not proved their right to enter the said United States to the satisfaction of any proper officer of immigration of the said United States [5] and had not been admitted to the United States by any officer of immigration of the United States pursuant to the laws of the United States, in violation of the provisions of section 11 of the Act of Congress of May 6th, 1882, as amended by the Act of Congress of July 5th, 1884.

And the said attorney of the United States saith that all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court, and that by reason thereof, and by force of the statutes of the United States in such cases made and provided, the aforementioned and described ship or vessel, her boats, tackle, apparel, furniture and cargo became and are forfeited to the use of said United States of America.

WHEREFORE, the said attorney of the United States for the Northern District of California prays that the usual process and monition of this Honorable Court issue in this behalf, and that all persons interested in the aforementioned ship or vessel may be cited in general and special to answer the premises, and all due proceedings being had, that the said ship or vessel, her boats, tackle, apparel, furniture and cargo may, for the causes aforesaid, and others appearing, be condemned to the use of the United States of America according to the form of the statutes of the said United States of America in such

cases made and provided.

Dated January 20th, 1914.

JOHN W. PRESTON,

Attorney for the United States for the Northern
District of California.

WALTER E. HETTMAN,

Assistant U. S. Attorney.

[Endorsed]: Filed Jan. 20, 1914. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [6]

*In the District Court of the United States, in and for
the Northern District of California, First Di-
vision.*

IN ADMIRALTY.

THE UNITED STATES OF AMERICA,

vs.

THE GASOLINE LAUNCH "CALYPSO," her
Boats, Tackle, Apparel, Furniture, and Cargo.

**Claim of William L. Sassaman and William H.
Singleton.**

And now, Wililam L. Sassaman and William H. Singleton, respectively owner of and holder of maritime liens on the gasoline launch "Calypso," her boats, tackle, apparel, furniture, and cargo, intervening for their own interests in the said vessel, the "Calypso," her boats, tackle, apparel, furniture, and cargo, appear before this Honorable Court, and make claim to the said vessel, her boats, tackle, apparel, furniture, and cargo, as the same are attached by the Marshal under process of this Court, at the instance of the United States of America, and

the said William L. Sassaman and William H. Singleton aver that they were entitled to the possession of the said vessel at the time of the attachment thereof, and that they are respectively the true and *bona fide* owner of the said vessel and the holder of a materialman's lien in the sum of thirty-four hundred dollars for advances, supplies and repairs, and that no other person is the owner thereof. Wherefore they pray to defendant accordingly.

WILLIAM L. SASSAMAN,
WILLIAM H. SINGLETON. [7]

State of California,
County of Los Angeles,—ss.

William L. Sassaman and William H. Singleton, being first duly sworn, each for himself, deposes and says: that he subscribed the foregoing claim and that the facts and matters set forth therein are true of his own knowledge.

WILLIAM L. SASSAMAN,
WILLIAM H. SINGLETON.

Subscribed and sworn to before me this 9th day of February, 1914.

[Seal] EDWARD W. TUTTLE,
Notary Public in and for the County of Los Angeles,
State of California.

[Endorsed]: Filed Feb. 10, 1914. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [8]

*In the District Court of the United States in and for
the Northern District of California, First Di-
vision.*

IN ADMIRALTY.

THE UNITED STATES OF AMERICA,

vs.

THE GASOLINE LAUNCH "CALYPSO," her
Boats, Tackle, Apparel, Furniture, and Cargo.

**Answer of William L. Sassaman and William H.
Singleton.**

The answer of William L. Sassaman of the City of Los Angeles, California, and William H. Singleton of El Casco, Riverside County, California claimants, to the libel of the United States of America against the gasoline launch 'Calypso,' her boats, tackle, apparel, furniture, and cargo, in an alleged cause of forfeiture against said ship, admits, alleges and denies as follows:

I.

They admit the averments of paragraph one of the libel.

II.

That as to the matters alleged in paragraph two of the libel claimants are informed and believe that the launch "Calypso" has never at any time been outside of the United States or in foreign waters or in the port of Ensenada or any other Mexican port, and upon such information and belief they allege such to be the facts and deny that the said Gasoline Launch "Calypso" at any time arrived or came into

the United States, either at the port of Monterey or at any other port from the port of Ensenada in the Republic of Mexico, or from any other foreign port or place.

Claimants further deny that Morris Pettenger is now or ever was at any time the master of the said vessel or authorized or employed by claimants, or either of them, or by anyone else to act as master of said vessel; but on the contrary, claimants allege that claimant William L. Sassaman was at all times mentioned in the libel the master of the said vessel and entitled to command and navigate her. [9]

III.

Claimants are informed and believe and upon such information and belief allege that never at any time, either in the port of Monterey or elsewhere, did the said vessel have on board eighteen or any Chinese passengers; and upon the same grounds allege that at no time in said harbor of Monterey did said vessel have on board any Chinese or other passengers or any cargo, and that at no time or place did said vessel have or take on board any Chinese persons or passengers or allow any or any such passengers or persons to land in the United States; and upon the same information and belief claimants deny that said Morris Pettenger or the master of said vessel knew that any Chinese passengers were on or were taken on board said "Calypso" and deny that said Morris Pettenger or the master of said vessel permitted or allowed any Chinese passengers or persons to land in the United States, and deny that said Morris Pettenger or the master of said vessel aided and

abetted or aided or abetted the landing in the United States from said vessel any Chinese passengers or persons, or any Chinese passengers or persons, who had not proved their right to be and land in the United States or who were not at the time of the alleged landing entitled to be and land in the United States.

WHEREFORE, these claimants pray this Honorable Court will pronounce against said libel and dismiss the same with costs.

WILLIAM L. SASSAMAN,
WILLIAM H. SINGLETON.

EDWARD W. TUTTLE,

E. C. ROBINSON,

Proctors for Claimants. [10]

State of California,

County of Los Angeles,—ss.

On this 10th day of February, 1914, before me, personally appeared William L. Sassaman, who, being by me first duly sworn, deposes and says: that he is one of the claimants in the above-entitled cause; that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge except as to the matters and things stated to be on his information and belief, and as to those matters and things, he believes them to be true.

WILLIAM L. SASSAMAN.

Subscribed and sworn to before me this 10th day of February, 1914.

[Seal]

EDWARD W. TUTTLE,
Notary Public in and for the County of Los Angeles,
State of California.

Received copy of within answer this 13th day of Feb. 1914.

JOHN W. PRESTON,
U. S. Atty.

[Endorsed]: Filed Feb. 10, 1914. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [11]

*In the District Court of the United States, in and
for the Northern District of California, First
Division.*

IN ADMIRALTY.

THE UNITED STATES OF AMERICA,

vs.

THE GASOLINE LAUNCH "CALYPSO," Her
Boats, Tackle, Apparel, Furniture and Cargo.

Claim of Los Angeles Creamery Company.

To the Honorable Judges of the District Court of the
United States, in and for the Northern District
of California:

Los Angeles Creamery Company, mortgagee of the
gasoline launch "Calypso," her boats, tackle, apparel,
furniture, machinery and appurtenances, interven-
ing for its own interest in said launch, her boats,
tackle, apparel, furniture, machinery, and appurte-
nances, appears before this Honorable Court and
claims an interest in said launch, her boats, tackle,

apparel, furniture, machinery and appurtenances, and states that it is the true and *bona fide* mortgagee thereof under two certain chattel mortgages, entitling it to the possession of said launch, her boats, tackle, apparel, furniture, machinery and appurtenances, and entitling it to sell, at private sale, or to have sold, under a decree of foreclosure, the said launch, her boats, tackle, apparel, furniture, machinery and appurtenances.

That said mortgages were executed to claimant by William L. Sassaman and Morris Pettinger, owners of the said launch, the first mortgage being dated April 30, 1913, and made to secure the promissory note of the said owners to the mortgagee in the principal sum of Five Hundred Dollars, and the second mortgage being dated September 16th, 1913, and being between the same parties and made [12] to secure the payment of a promissory note of the said owners to the mortgagee in the principal sum of Three Hundred (\$300.00) Dollars, the whole amount unpaid on said promissory notes being Seven Hundred and Sixty (\$760.00) Dollars. The whole sum of principal and interest of said second note is due and unpaid; and sundry installments of principal and interest of said first note are due and unpaid; that said first promissory note by its terms provides that should default be made in the payment of any installment of interest when due or in any installment of principal when due, then the whole sum of principal and interest shall become immediately due and payable at the option of the holder of said note; that claimant has declared and hereby declares the whole

sum of principal and interest of said first promissory note to be now due and payable, and says that there is now due, owing and unpaid from said mortgagors to claimant upon said promissory notes, the sum of Seven Hundred Sixty (\$760.00) Dollars, with interest thereon from and after the first day of February, 1914, at the rate of eight per cent per annum, payable monthly and compounded monthly if not so paid; that in and by said mortgages and each of them, the mortgagors agree to pay the mortgage upon foreclosure sale of said mortgaged vessel, a reasonable attorney's fee in the premises, which attorney's fees are secured by said mortgages; that said mortgages are so conditioned and provide that upon the falling due of any moneys agreed to be paid in said notes, the mortgagee is authorized to take possession of the property mortgaged and sell the same as in case of pledge or proceed with the foreclosure of said mortgages.

That, of the sums secured by said mortgages, Three Hundred (\$300.00) Dollars of the principal thereof is money supplied said owners to procure and pay marine insurance upon said vessel, her boats, tackle, apparel, furniture, machinery and appurtenances, and [13] the balance thereof is for money furnished to complete and equip said vessel for use and voyages upon the high seas.

Accordingly, claimant prays that said launch, her boats, tackle, apparel, furniture, machinery and appurtenances shall be delivered to and restored to this claimant, and that if a delivery to claimant cannot be had that the amounts due claimant from and upon

said mortgages be ordered paid to claimant out of any proceeds or remnants from any sale ordered herein of said vessel, her boats, tackle, apparel, furniture, machinery and appurtenances;

That in case of sale ordered herein that claimant be permitted to file its claim herein against any moneys paid into the registry of the Court herein, and for such other relief as may be meet in the premises.

LOS ANGELES CREAMERY COMPANY.

By GEO. E. PLATT,

Its President.

BLACK & CLARK,

LLOYD, CHENEY & GEIBEL,

Proctors for Claimant.

State of California,

County of Los Angeles,—ss.

GEORGE E. PLATT, being first duly sworn, deposes and says that he is the President of the Los Angeles Creamery Company, the foregoing mentioned claimant; that he is authorized to make, and does make, this affidavit in behalf of said claimant; that he has read the said claim and the facts therein stated are true.

GEO. E. PLATT.

Subscribed and sworn to before me this 19th day of February, 1914.

[Seal]

MARTIN E. GEIBEL,

Notary Public in and for the County of Los Angeles,
State of California.

[Endorsed]: Filed Feb. 21, 1914. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [14]

*In the District Court of the United States, in and for
the Northern District of California, First Di-
vision.*

IN ADMIRALTY.

UNITED STATES OF AMERICA

vs.

THE GASOLINE LAUNCH "CALYPSO," Her
Boats, Tackle, Apparel, Furniture and Cargo.

**Answer of Los Angeles Creamery Company and
Petition in Intervention.**

To the District Court of the United States, for the
Northern District of California:

The answer of Los Angeles Creamery Company,
a corporation intervening to the Libel against the
gasoline launch "Calypso" in the above-entitled
cause, alleges as follows:

I.

That intervenor is a corporation duly organized
and existing under and by virtue of the laws of the
State of California, and was such at all the times
herein mentioned.

II.

That intervenor has no knowledge, information or
belief sufficient to enable it to either admit or deny
paragraphs II, III, IV, V, VI and VII of the
LIBEL OF INFORMATION herein, therefore
upon such grounds and for such reasons, intervenor
neither admits nor denies said allegations in said
LIBEL OF INFORMATION.

III.

Intervenor alleges that it is a true and *bona fide* mortgagee of said gasoline launch "Calypso" by virtue of two certain chattel mortgages owned by intervenor, entitling it to possession of said launch, her boats, tackle, apparel, furniture, machinery and appurtenances, and entitling it to sell at private sale or to have sold under a decree of foreclosure, the said launch, her boats, tackle, apparel, furniture, machinery and appurtenances. That said [15] mortgages were executed to Los Angeles Creamery Company, intervenor by William L. Sassaman and Morris Pettenger, owners of said launch; the first mortgage being dated April 30th, 1913, and made to secure the promissory note of said owners to the mortgagee in the principal sum of \$500.00, and the second mortgage being dated September 16th, 1913, and being between the same parties and made to secure the payment of a promissory note of the said owners to the mortgagee in the principal sum of \$300.00, the whole amount unpaid on said promissory notes being \$760.00. The whole sum of principal and interest of said second note is due and unpaid. That there remains due on said promissory notes the sum of \$760.00, which said sum is now due and unpaid; and sundry installments of principal and interest of said first note are due and unpaid; that said first promissory note, by its terms provides that should default be made in the payment of any installment of interest when due, or in any installment of principal when due, then the whole sum of principal and interest shall become immediately due and payable at the

option of the holder of said note. That intervenor has declared, and hereby declares the whole sum of principal and interest of said first promissory note to be now due and payable, and alleges that there is now due, owing and unpaid from said mortgagors to intervenor upon said promissory notes, the sum of \$760.00, with interest thereon from and after the first day of February, 1914, at the rate of 8% per annum, payable monthly and compounded monthly if not so paid. That in and by said mortgages and each of them, mortgagors agree to pay the mortgagee, upon foreclosure sale of said mortgaged vessel, a reasonable attorney's fee in the premises, which attorney's fees are secured by said mortgages; that said mortgages are so conditioned [16] and provide that upon the falling due of any moneys agreed to be paid in said notes, the mortgagee is authorized to take possession of the property mortgaged and sell the same as in case of pledge or proceed with the foreclosure of said mortgages. Intervenor alleges that of the sums secured by said mortgages, \$300.00 of the principal thereof is for money supplied said owners to procure and pay marine insurance upon said vessel, her boats, tackle, apparel, furniture, machinery and appurtenances, and the balance thereof is for money furnished to complete and equip said vessel for use and voyages upon the high seas.

IV.

That each of said mortgages was recorded in the office of the United States Collector of Customs, at Los Angeles, California. The aforesaid mortgage for \$300.00 being recorded October 29th, 1913, at ten

o'clock A. M. in Book 1351-3, page 4; and the aforesaid mortgage for \$500.00 being recorded October 29th, 1913, at ten o'clock A. M. in Book 1351-3, page 3, in the office of the United States Collector of Customs, at Los Angeles, California.

V.

Intervenor alleges that on the 21st day of February, 1914, it filed its duly verified claim herein in this honorable Court against said gasoline launch "Calypso," her boats, tackle, apparel, furniture, machinery and appurtenances, which said claim is hereby referred to and made a part hereof.

VI.

That intervenor accepted said notes and mortgages and loaned the money thereon, as hereinbefore alleged, in good faith, fully believing that said launch "Calypso" would be used for no other than lawful and proper purposes. That intervenor had no knowledge of any of the matters alleged in paragraph II, III, IV, V, VI and [17] VII of the LIBEL OF INFORMATION at any time prior to the filing of said LIBEL OF INFORMATION, or of any unlawful use of said "Calypso" or intention to unlawfully use same at any of said times.

WHEREFORE, intervenor prays that its said claim be allowed, and that said launch "Calypso," her boats, tackle, apparel, machinery and appurtenances be delivered to and restored to this intervenor, and that if a delivery to this intervenor cannot be had, intervenor prays that the amounts due upon said mortgages be ordered paid to intervenor out of any proceeds or remnants from any sale of said launch,

her boats, tackle, apparel, furniture, machinery and appurtenances ordered herein; that in case of sale ordered herein that intervenor be permitted to set forth by petition or otherwise its claim herein against any moneys paid into the registry of this court as proceeds of said sale; and for such other and further relief as may be meet in the premises.

LOS ANGELES CREAMERY COMPANY.

By GEO. E. PLATT,

Its President, Intervenor.

LLOYD, CHENEY & GEIBEL,

BLACK & CLARK,

Proctors for Intervenor.

State of California,

County of Los Angeles,—ss.

GEO. E. PLATT, being first duly sworn, deposes and says:

That he is the President of the Los Angeles Creamery Company, the foregoing mentioned claimant and intervenor; that he is authorized to make and does make this affidavit in behalf of said claimant and intervenor. That he has read the foregoing answer and the facts therein stated are true.

GEO. E. PLATT.

Subscribed and sworn to before me this 27th day of February, 1914.

[Seal]

MARTIN E. GEIBEL,

Notary Public in and for the County of Los Angeles,

State of California. [18]

Receipt of a copy of the within Answer is hereby admitted this 2d day of March, A. D. 1914.

JOHN W. PRESTON,
WALTER E. HETTMAN,
U. S. Attorneys for Libellant.

[Endorsed]: Filed Mar. 2, 1914. W. B. Maling,
Clerk. By Francis Krull, Deputy Clerk. [19]

*In the District Court of the United States in and for
the Northern District of California, First Di-
vision.*

IN ADMIRALTY.

THE UNITED STATES OF AMERICA,

vs.

THE GASOLINE LAUNCH "CALYPSO," Her
Boats, Tackle, Apparel, Furniture and Cargo.

**Amended Answer of William L. Sassaman and
William H. Singleton.**

Come now claimants and intervenors, William L. Sassaman, of Los Angeles, California, and William H. Singleton, of El Casco, Riverside County, California, and by leave of Court first obtained, file herein their amended answer to the libel of the United States, and say:

I.

That on the 16th day of January, 1914, long prior thereto and at all times herein mentioned, said William L. Sassaman was and now is the owner of a five-sixth interest in said gasoline launch "Calypso," her boats, tackle, apparel and furniture.

II.

Claimants and intervenors admit that said vessel, her boats, tackle, apparel and furniture have been seized by certain officers of the United States claiming a forfeiture thereof, but allege that said seizure and claim are without right as against these claimants and intervenors.

III.

That as to the matters alleged in paragraph two of the libel, claimants and intervenors are informed and believe that the launch "Calypso" has never at any time been outside the United States or in foreign waters or in the port of Ensenada or any other Mexican port, and upon such information and belief they allege such to be [20] the facts and deny that the said gasoline launch "Calypso" at any time arrived or came into the United States, either at the port of Monterey or at any other port from the port of Ensenada in the Republic of Mexico, or from any other foreign port or place.

Claimants and intervenors further deny that Morris Pettinger is now or ever was at any time the master of the said vessel or authorized or employed by claimants and intervenors, or either of them, or by anyone else to act as master of said vessel; but, on the contrary, claimants and intervenors allege that claimant, William L. Sassaman, was at all times mentioned in the libel the master of the said vessel and entitled to command and navigate her.

IV.

Claimants and intervenors have no knowledge, information or belief sufficient to enable them to either

admit or deny the averments of paragraphs III, IV, V, VI and VII of the libel herein except as herein stated; therefore, upon such grounds and for such reasons, they neither admit nor deny said averments; except that they deny that said Morris Pettinger was master of said vessel as alleged in said libel, or at all, and further they allege that, if said Morris Pettinger was acting as master of said vessel or did the acts alleged in the libel, or did either or any of them, at the time of so doing said Pettinger was not in fact master of said vessel, but was in possession of said vessel without right and was acting without the consent, or knowledge of claimants and intervenors; and that, at the time of the voyage alleged in the libel, said vessel was stolen from the owner and wholly out of his control.

V.

Claimants and intervenors allege that at all times in the libel mentioned William H. Singleton was and now is the *bona fide* [21] holder and owner of materialmen's liens in the sum of \$3400.00 for advances, supplies and repairs furnished for and used in and for said vessel, and that, on and ever since December 23, 1913, said William H. Singleton became the owner of and has a maritime claim against said vessel, to wit, the right to demand, acquire of and receive from William L. Sassaman and Morris Pettinger a mortgage upon said vessel for said advances, supplies and repairs for the amount of \$3400.00 with interest at 8% with the delivery of an insurance policy of \$5000.00 upon said vessel.

VI.

Claimants and intervenors allege that on the 23d day of December, 1913, said "Calypso" was heavily in debt and tied up in the inner harbor of Long Beach, and it was expressly agreed by and between these claimants and intervenors, and said Morris Pettenger, who then owned a one-sixth interest in said vessel, subject to the rights of William H. Singleton herein alleged, that said Pettenger had no authority to and would make no contracts concerning said "Calypso" or take said vessel out on any trip without a permit from William L. Sassaman; and would borrow no money nor give any personal note on the "Calypso" at any time; and would not employ a crew without a permit from said Sassaman; and that under no circumstances should the ship's papers be transferred to anyone except by William L. Sassaman and that William L. Sassaman was managing owner.

That thereafter in violation of said agreements and without the knowledge, consent, acquiescence or connivance of these claimants and intervenors, or either of them, and against their wishes and desire, said Pettenger took said vessel to sea and made the trip or voyage therewith unknown to claimants and intervenors which resulted in said seizure of said vessel. [22]

VII.

That on or about November 24, 1913, said Morris Pettenger did falsely represent to the U. S. Collector of Customs at San Pedro, California, that he was managing owner of said "Calypso" and did without

right secure a transfer of the ship's papers to himself and did cause himself to be named as master of said vessel in said ship's papers. That said acts were done without the knowledge or consent of these claimants and intervenors, or either of them, and said transfer of said ship's papers and the naming of Morris Pettenger as master thereof were fraudulent and as against these claimants and intervenors wholly void and of no effect.

That at the time of making the agreement mentioned in the last paragraph, these claimants and intervenors did not know of said purported transfer of said ship's papers or of the naming of Morris Pettenger as master of said vessel therein nor did they learn or know of said matters until on or about March 7th, 1914, and neither of them has consented to or acquiesced therein, but forthwith upon discovery have disapproved, repudiated and denounced said acts.

VIII.

Claimants and intervenors deny that the ship or vessel described in the libel, her boats, tackle, apparel and furniture, or any of them, became or are forfeited to the use of the United States, affecting the interest of these claimants and intervenors.

WHEREFORE, these claimants and intervenors pray this Honorable Court will pronounce against

said libel and dismiss the same with costs.

WM. L. SASSAMAN.

W. H. SINGLETON.

S.

LLOYD, CHENEY & GEIBEL,

Attorneys and Proctors for William L. Sassaman
and William H. Singleton said Claimants and
Intervenors. [23]

State of California,

City and County of San Francisco,—ss.

On this 2d day of April, 1914, before me, personally appeared William L. Sassaman, who, being by me first duly sworn, deposes and says: That he is one of the claimants in the above-entitled cause; that he has read the foregoing amended answer and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters and things stated to be on his information and belief, and as to those matters and things, he believes them to be true.

WM. L. SASSAMAN.

Subscribed and sworn to before me this 2d day of April, 1914.

[Seal]

C. W. CALBREATH,

Deputy Clerk U. S. District Court, Northern District
of California.

Due service and receipt of a copy of the within Amended Answer is hereby admitted this 2d day of April, A. D. 1914.

JOHN W. PRESTON,

Attorney for U. S.

[Endorsed]: Filed Apr. 2, 1914. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [24]

*In the District Court of the United States, in and
for the Northern District of California, First
Division.*

IN ADMIRALTY.

UNITED STATES OF AMERICA,

vs.

The Gasoline Launch "CALYPSO," Her Boats,
Tackle, Apparel, Furniture and Cargo.

**Stipulation [for Taking Depositions and Deposi-
tions].**

IT IS STIPULATED that depositions may be taken in the above-entitled matter, on behalf of the Los Angeles Creamery Company, on Wednesday the 18th day of March, 1914, beginning at the hour of 10 o'clock A. M., before C. K. Schade, a Notary Public in and for Los Angeles County; that at such time the deposition of George E. Platt may be taken and that the depositions of the officers and agents of the claimant may be taken and of such other persons as may be produced.

IT IS FURTHER STIPULATED that the government does not waive any rights which it may have to object to the failure of the Los Angeles Creamery Company and their attorneys to appear in the matter within the time fixed by the Court, said date fixed being February 26th, 1914, said claimant not having

filed an answer until after said date of February 26th, 1914.

BLACK & CLARK,
LLOYD, CHENEY & GEIBEL,
Attorneys for Los Angeles Creamery Co.
JNO. W. PRESTON,
U. S. Attorney.

Dated March 12, 1914. [25]

*In the District Court of the United States, in and
for the Northern District of California, First
Division.*

IN ADMIRALTY.

UNITED STATES OF AMERICA,

vs.

The Gasoline Launch "CALYPSO," Her Boats,
Tackle, Apparel, Furniture and Cargo.

State of California,
County of Los Angeles,—ss.

**Depositions of Witnesses R. M. Smith, William L.
Sassaman and Geo. E. Platt.**

BE IT REMEMBERED, that pursuant to the written stipulation of the parties in said action hereto annexed and made a part hereof by reference, and on Wednesday the 18th day of March, 1914, beginning at the hour of ten o'clock A. M., before C. K. Schade, a Notary Public in and for the County of Los Angeles, State of California, residing therein, duly commissioned and sworn, personally appeared R. M. Smith, William L. Sassaman and Geo. E. Platt,

witnesses produced on behalf of the Los Angeles Creamery Company, a corporation, intervenor by petition in the above-entitled matter, and each of whom being by me first duly sworn, was then and there examined and interrogated by Warren E. Lloyd, Esq., of counsel for said intervenor, and was cross-examined and interrogated by Harry R. Archbald, Esq., Assistant United States Attorney, Southern District of California, of counsel for said United States, and respectively testified as follows:

Deposition of R. M. Smith.

R. M. SMITH, being first duly sworn by said Notary Public, testified as follows:

Direct Examination by Mr. LLOYD.

Q. You are assistant secretary of the Los Angeles Creamery Company, a corporation? [26]

A. Yes, sir.

Q. As such you have charge of the papers and documents of the company? A. I do.

Q. I show you a chattel mortgage, dated April 30th, 1913, between William L. Sassaman and Morris Pettinger, mortgagors, and Los Angeles Creamery Company a mortgagee recorded at request of mortgagee May 10th 1913, in Book 379, Page 346 of Chattel Mortgages, Records of Los Angeles County, California, and received for record October 29th, 1913, at ten o'clock A. M. by W. F. Mahar, Deputy United States Collector of Customs of the Port of Los Angeles, and recorded in Book 1351-3, Page 3. Does the Los Angeles Creamery Company own that mortgage, A. Yes, sir.

(Deposition of R. M. Smith.)

Q. Was a promissory note given by William L. Sassaman and Morris Pettinger to Los Angeles Creamery Company in connection with said chattel mortgage? A. Yes, sir.

Q. Have you the note with you? A. I have.

Q. Is that promissory note in words and figures the same as the promissory note set out in the chattel mortgage? A. It is.

Q. Has there been anything paid upon said promissory note?

A. Seventy-five dollars has been paid, June 11th, 1913.

It was stipulated between counsel for the United States and counsel for Los Angeles Creamery Company that the promissory note set out in words and figures in said chattel mortgage is the same as the promissory note testified to by said witness, and that said note bears the endorsement: "June 11, 1913, paid \$75.00." [27]

Q. Is seventy-five dollars all that has been paid upon said promissory note? A. Yes sir.

Mr. LLOYD.—The Los Angeles Creamery Company attaches to this deposition the chattel mortgage referred to by said witness, and marks it exhibit "A" and makes it a part hereof.

(Said Exhibit "A" is hereto annexed.)

Q. I show you a chattel mortgage, dated September 16th, 1913, between the same parties and securing a promissory note for \$300.00, recorded at request of mortgagee, September 18th, 1913, in Book 388, Page 307 of Chattel Mortgages Records of Los An-

(Testimony of R. M. Smith.)

geles County, California, and received for record October 29th, 1913, at ten o'clock A. M. by W. F. Mahar, Deputy United States Collector of Customs of the Port of Los Angeles and recorded in Book 1351-3, page 4. Does the Los Angeles Creamery Company own that note and mortgage?

A. Yes.

Q. Has anything been paid upon said note described in said mortgage? A. No, sir.

Q. Is the note you have the same as the copy in the mortgage? A. Yes, sir.

It was stipulated between counsel for the United States and counsel for Los Angeles Creamery Company that the promissory note set out in words and figures in said chattel mortgage is the same as the promissory note testified to by witness.

Mr. LLOYD.—Los Angeles Creamery Company attaches to this deposition the chattel mortgage referred to by said witness and marks it Exhibit "B" and makes it a part hereof.

(Said Exhibit "B" is hereto annexed. [28])

Mr. ARCHBALD.—No cross-examination.

Said R. M. Smith received this deposition after it had been written and carefully read same, whereupon said witness signed the same.

R. M. SMITH.

Subscribed and sworn to before me this 19th day of March, 1914, at Los Angeles, California.

C. K. SCHADE. [Seal]

Notary Public in and for the County of Los Angeles,
State of California. [29]

Exhibit "A" [to Deposition of R. M. Smith—Chattel Mortgage, April 30, 1913, William L. Sassaman et al., to Los Angeles Creamery Co.]

THIS INDENTURE, made this 30th day of April, 1913, by and between WILLIAM L. SASSAMAN and MORRIS PETTENDER, Mortgagors, and LOS ANGELES CREAMRY COMPANY, a corporation organized under the laws of the State of California, whose corporate existence is hereby admitted, mortgagee; all of Los Angeles County, California, WITNESSETH:

That said mortgagors hereby mortgage to the said mortgagee, and to its successors and assigns, all that certain vessel and property described as follows, to wit:

A gasoline screw of twenty-two tons burden called the "Calypso," now located in Los Angeles Harbor, and which when completed and registered at Los Angeles Harbor will have the number 210739; United States Registry; and all her tackle, apparel, furniture, machinery, 90 horse power Corliss Marine internal combustion engine, and appurtenances.

As security for the payment to said Mortgagee of the indebtedness evidenced by one promissory note, and any renewal or renewals thereof, in words and figures as follows:

\$500.00 Los Angeles, Cal., April 30, 1913.

In the amounts and at the times hereinafter states, for value received, We promise to pay to Los Angeles Creamery Company, or order, at 1120 Towne Avenue,

Los Angeles, California the principal sum of Five Hundred Dollars. Of said principal sum I promise to pay the sum of Seventy-five (\$75.00) Dollars on the 1st day of June, 1913, and Seventy-five (\$75.00) Dollars on the 1st day of each succeeding month thereafter until said principal sum has been fully paid, with interest thereon from date hereof until paid, at the rate of Eight (8%) per cent per annum, payable monthly; and should the interest not be so paid, it shall become a part of the principal and thereafter bear like interest as the principal. Should default be made in the payment of any installment of interest when due, or in any installment of principal when due, then the whole sum of principal and interest shall become immediately due and payable at the option of the holder of this note. Principal and interest payable in gold coin of the United States. This note is secured by chattel mortgage.

WILLIAM L. SASSAMAN.

MORRIS PETTENDER. [30]

And it is further agreed that said mortgagee may foreclose this mortgage in case of any default hereunder, either in the manner provided by law, or by seizure of said property and by sale at public auction upon ten days' published notice without any proceedings in court; that said mortgagee or its agents, assigns or representatives may upon such sale become purchasers, and may execute and deliver a sufficient bill of sale to transfer completely and absolutely to any purchaser or purchasers the title and property in and to the said vessel, its tackle, apparel, furniture and appurtenances, and the mortgagor's interest in

said engine, and that the recitals of such bill of sale shall be conclusive evidence against said mortgagors and their privies as to the regularity of all the proceedings and matters recited; upon foreclosure sale the proceeds shall be applied first in paying all advances hereunder, keepers' charges, costs and expense of seizure, sale or foreclosure together with a reasonable attorney's fee in the premises which the mortgagors hereby agree to pay. The remainder, if any, shall be delivered to the mortgagors herein, their assigns or representatives.

It is further agreed that upon the completion and registration of said vessel said mortgagors will make, execute and deliver any other or further mortgage on said vessel which may be required or become necessary to fully secure the said mortgagee as to the matters above set forth.

This mortgage is subject only to lien and contract of the Hatfield Machinery Company, a corporation, respecting the engine to be placed by said corporation in said vessel, not exceeding \$1,000.00.

The mortgagors agree to keep the said property insured [31] for the benefit of the mortgagee in the sum of at least Five Hundred (\$500.00) Dollars.

It is also agreed that if the mortgagors shall fail to make any payments as in said promissory note provided, or shall violate any agreement herein, then the mortgagee may, at its option, take possession of said property, using all necessary force so to do, and may immediately proceed to sell the same in the manner provided by law, and from the proceeds pay the whole amount in said note or in this mortgage

specified, or foreclose this mortgage by action and out of the moneys arising from such sale to retain the unpaid principal and interest, together with the costs, charges and payments secured by this mortgage.

WM. L. SASSAMAN. [Seal]

MORRIS PETTENDER. [Seal]

State of California,

County of Los Angeles,—ss.

On this 30th day of April, 1913, before me, Martin E. Geibel, a Notary Public in and for said Los Angeles County, residing therein, duly commissioned and sworn, personally appeared William L. Sassaman and Morris Pettenger known to me to be the persons whose *name* are subscribed to the within instrument, and acknowledged to me that he executed the same.

Witness my hand and official seal.

[Seal]

MARTIN E. GEIBEL,

Notary Public in and for the County of Los Angeles,
State of California. [32]

State of California,

County of Los Angeles,—ss.

George E. Platt, agent for, in behalf of, and on the authority of the Los Angeles Creamery Company, the mortgagee, and William L. Sassaman and Morris Pettenger, mortgagors, in the foregoing mortgage named, each being duly sworn, each for himself doth depose and say: That the aforesaid mortgage is made

in good faith and without design to hinder, delay or defraud any creditors.

GEO. E. PLATT,
WM. L. SASSAMAN,
MORRIS PETTENDER.

Subscribed and sworn to before me this 9th day of May, 1913.

[Seal] MARTIN E. GEIBEL,
Notary Public in and for the County of Los Angeles,
State of California.

[Endorsed]: Los Angeles, Cal., Oct. 29, 1913. Received for record 10 A. M. 10/29/13. Recorded Book 1351-3, Page 3. W. F. Mahar, Dep. Coll. Compared Document Caldwell Book Howlett 534.

Recorded at Request of Mtgee. May 10, 1913. At 51 min. past 11 A. M., in Book 379, Page 246 of Chattel Mortgages. Records Los Angeles Co., Cal. C. L. Logan, County Recorder. By R. L. Hazen, Deputy. Fee \$1.70 29 541

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12

Exhibit "B" [to Deposition of R. M. Smith, Chattel Mortgage, September 16, 1913, William L. Sassaman et al., to Los Angeles Creamery Co.]

THIS MORTGAGE, Made this 16th day of September, 1913, by and between WILLIAM L. SASSAMAN and MORRIS PETTENDER, Mortgagors, and LOS ANGELES CREAMERY COMPANY, a corporation organized under the laws of the State of California, whose corporate existence is hereby ad-

mitted, mortgagee; all of Los Angeles County, California, WITNESSETH:

That said mortgagors hereby mortgage to the said mortgagee, and to its successors and assigns, all that certain property described as follows, to wit:

A gasoline screw launch of twenty-two tons burden called the "Calypso," now located in Los Angeles Harbor, and registered at Los Angeles Harbor with the number 210739; United States Registry; and all her tackle, apparel furniture machinery, ninety horse-power Corliss Marine internal combustion engine, and appurtenances.

As security for the payment to said mortgagee of the indebtedness evidenced by one promissory note, and any renewal or renewals thereof, in words and figures as follows:

\$300.00 Los Angeles, Cal., September 16, 1913.

Ninety (90) days after date, for value received, we promise to pay to Los Angeles Creamery Company, or order, at 1120 Towne Avenue, Los Angeles, California, the principal sum of Three Hundred Dollars, with interest thereon from date hereof until paid at the rate of Eight (8%) per cent per annum, payable monthly; and should the interest not be so paid, it shall become a part of the principal and thereafter bear like interest as the principal. Should default be made in the payment of any installment of interest when due, then the whole sum of principal and interest shall become immediately due and payable at the option of the holder of this note. Principal and interest payable in gold coin of the United

States. This note is secured by a second chattel mortgage.

WILLIAM L. SASSAMAN,
MORRIS PETTENDER. [34]

And it is further agreed that said mortgagee may foreclose this mortgage in case of any default hereunder, either in the manner provided by law, or by seizure of said property and by sale at public auction upon ten days' published notice without any proceedings in Court; that said mortgagee or its agents, assigns or representatives may, upon such sale, become purchasers, and may execute and deliver a sufficient bill of sale to transfer completely and absolutely to any purchaser or purchasers the title and property in and to the said vessel, its tackle, apparel, furniture and appurtenances, and the mortgagors' interest in said engine, and that the recitals of such bill of sale shall be conclusive evidence against said mortgagors and their privies as to the regularity of all the proceedings and matters recited; upon foreclosure sale the proceeds shall be applied first in paying all advances hereunder, keepers' charges, costs and expenses of seizure, sale or foreclosure, together with a reasonable attorneys' fee in the premises which the mortgagors hereby agree to pay, and the payment of all sums expended or advanced by the mortgagee for incumbrances, adverse claims, insurance, inspection, repairs, protection, or for any other purpose necessary to keep alive the rights of the mortgagee herein. The remainder, if any, shall be delivered to the mortgagors herein, their assigns or representatives.

The mortgagors agree to keep the said property

insured against loss for the benefit of the mortgagee to the amount required by and in such insurance companies as may be satisfactory to the mortgagee, and to assign the policies therefor to the mortgagee; and promise to pay and settle, or cause to be removed by suit or otherwise, all adverse claims against said property.

The said mortgagors do hereby state, declare and warrant [35] that they are the sole and separate owners of all the hereinbefore described personal property and that there are no liens or incumbrances or adverse claims of any kind whatever on any part thereof, excepting a claim for salvage by J. A. Paschall against gasoline launch "Calypso," now pending in the District Court of the United States, for the Southern District of California, Southern Division, and the liens mentioned in the chattel mortgage of William L. Sassaman and Morris Pettenger to Los Angeles Creamery Company, dated April 30th, 1913, and recorded May 10th, 1913, in Book 379, page 246 of Chattel Mortgages, Records of Los Angeles County, California, and contract of Fulton and Woodley respecting material and labor not exceeding \$180.00.

It is also agreed that if the mortgagors shall fail to make any payments as in said promissory note provided, or shall violate any agreement herein, then the mortgagee may, at its option, take possession of said property, using all necessary force so to do, and may immediately proceed to sell the same in the manner provided by law, and from the proceeds pay the whole amount in said note or in this mort-

gage specified, or foreclose this mortgage by action and out of the moneys arising from such sale to retain the unpaid principal and interest, together with the costs, charges and payments secured by this mortgage.

The mortgagors agree that this mortgage is not assignable without the consent of the mortgagee first had and obtained.

WM. L. SASSAMAN. [Seal]

MORRIS PETTINGER. [Seal]

State of California,

County of Los Angeles,—ss.

On this 17th day of September, 1913, before me Martin E. Geibel, [36] a Notary Public in and for said Los Angeles County, residing therein, duly commissioned and sworn, personally appeared William L. Sassaman and Morris Pettinger known to me to be the persons whose names are subscribed to the within instrument, and acknowledged to me that they executed the same.

Witness my hand and official seal.

[Seal]

MARTIN E. GEIBEL,

Notary Public in and for the County of Los Angeles,
State of California.

State of California,

County of Los Angeles,—ss.

Geo. E. Pratt, agent for, in behalf of, and on the authority of the Los Angeles Creamery Company, the mortgagee, and William L. Sassaman and Morris Pettinger, mortgagors, in the foregoing mortgage named, each being duly sworn, each for him-

self doth depose and say: That the aforesaid mortgage is made in good faith and without design to hinder, delay or defraud any creditors.

GEO. E. PLATT.

WM. L. SASSAMAN.

MORRIS PETTINGER.

Subscribed and sworn to before me this 17th day of September, 1913.

[Seal]

MARTIN E. GEIBEL,
Notary Public in and for the County of Los Angeles,
State of California.

[Endorsed]: Los Angeles, Cal. Oct. 29/13. Received for record 10 A. M. 10/29/13. Recorded book 1351-3 Page 4. W. F. Mahar, Dep. Coll. Compared Document. Moore. Book Stoermer, 415.

Recorded at Request of Mtgee. Sep. 18, 1913 at 49 min. past 1 P. M. in Book 388 Page 307 of Chattel Mortgages. Records Los Angeles Co., Cal. C. L. Logan, Deputy Recorder. By G. W. Taylor, Deputy. Fee \$1.70. 56 337. [37]

State of California,
County of Los Angeles,—ss.

I, C. K. SCHADE, a Notary Public in and for the County of Los Angeles, State of California, duly commissioned and sworn, being the commissioner authorized and agreed upon to take the foregoing deposition, do hereby certify that on the 18th day of March, 1914, beginning at the hour of ten o'clock A. M., at the law offices of Lloyd, Cheney & Geibel, Room 906 Central Building, Los Angeles, California,

pursuant to said stipulation and agreement, there appeared before me R. M. Smith, a witness on behalf of the Los Angeles Creamery Company, intervenor in the above-entitled matter, who was then and there by me duly sworn to testify the truth, the whole truth and nothing but the truth; that thereupon said witness was examined orally by Warren E. Lloyd, Esq., counsel for said intervenor, and cross-examined by Harry R. Archbald, Esq., Assistant United States Attorney for the Southern District of California and said witness made answer thereto, and the questions propounded by said counsel and the answers of said witness were then and there taken down in shorthand by Carrie M. Mandell, a stenographer, in my presence, and in the presence of said witness and said attorneys, and then reduced to writing. That said deposition, having been taken, was read over by said witness and corrected, subscribed and sworn to by him in my presence, and that the foregoing pages, numbered 2, 3, and 4, together with Exhibit "A" and Exhibit "B" thereto attached, are said deposition.

WITNESS my hand and seal of office this 20th day of March, 1914.

[Seal]

C. K. SCHADE,

Notary Public in and for the County of Los Angeles,
State of California.

My Commission expires Oct. 28, 1916. [38]

[Deposition of William L. Sassaman.]

WILLIAM L. SASSAMAN, being first duly sworn by said Notary Public, testified as follows:

Direct Examination by Mr. LLOYD.

Q. On or about April 30th, 1913, were you the owner or part owner of the gasoline screw launch of twenty-two tons burden called the "Calypso," then located at Los Angeles Harbor and assigned United States Registry No. 210739? A. I was.

Q. Did you have anything to do with borrowing Five Hundred Dollars from Los Angeles Creamery Company on a chattel mortgage security upon said boat? A. I did.

Q. Did you borrow money upon that boat?

A. Yes, sir.

Q. I show you Exhibit "A" in this deposition. Is that the chattel mortgage referred to?

A. Yes, sir.

Q. What was done with that money with reference to said boat?

A. It was used to make the last payments for the finishing of the boat, and went, a greater part of it, I think Four Hundred Dollars or more, to Fulton-Woodley Construction Company, and the rest of it, I believe, went to Cretsinger Bros., machinists.

Q. But it all went for finishing the boat?

A. Yes, sir.

Q. And for material and labor that went into the boat? A. Yes.

Q. I show you chattel mortgage exhibit "B" attached to this deposition, did you have anything to

(Deposition of William L. Sassaman.)

do with borrowing that money? [39]

A. Yes, sir.

Q. On or about September 16th, 1913, at the time the Three Hundred Dollars was borrowed, referred to in said chattel mortgage, were you owner or part owner of said "Calypso"? A. I was.

Q. Do you know what was done with that Three Hundred Dollars borrowed and secured by said chattel mortgage on said boat? A. Yes, sir.

Q. What was the money used for?

A. Used to pay the premium on Five Thousand Dollars insurance on the "Calypso."

Q. Did that insurance cover marine risks?

A. Yes, sir. All losses or partial losses at sea.

Cross-examination by Mr. ARCHBALD.

Q. You stated that you were owner, or part owner, which was it Mr. Sassaman?

A. I was part owner.

Q. What interest did you have in the boat at the time of the execution of this first mortgage?

A. I was five-sixths owner.

Q. And who owned the balance?

A. Morris Pettinger.

Q. Whose name is signed to the note for Five Hundred Dollars set out in the instrument?

A. Yes, sir.

Q. At the time Exhibit "B" was executed, what was your interest in the "Calypso"?

A. I was still five-sixths owner.

Q. And Mr. Pettinger the owner of the balance?

A. Yes, sir. [40]

(Deposition of William L. Sassaman.)

WILLIAM L. SASSAMAN received this deposition after it had been written and carefully read same, whereupon said witness signed the same.

WILLIAM L. SASSAMAN.

Subscribed and sworn to before me this 19th day of March, 1914, at Los Angeles, California.

[Seal]

C. K. SCHADE,

Notary Public in and for the County of Los Angeles,
State of California. [41]

State of California,

County of Los Angeles,—ss.

I, C. K. SCHADE, a Notary Public in and for the County of Los Angeles, State of California, duly commissioned and sworn, being the commissioner authorized and agreed upon to take the foregoing deposition, do hereby certify that on the 18th day of March, 1914, beginning at the hour of ten o'clock A. M., at the law offices of Lloyd, Cheney & Geibel, Room 906, Central Building, Los Angeles California, pursuant to said stipulation and agreement, there appeared before me William L. Sassaman, a witness on behalf of the Los Angeles Creamery Company, intervenor in the above-entitled matter, who was then and there by me duly sworn to testify the truth, the whole truth and nothing but the truth; that thereupon said witness was examined orally by Warren E. Lloyd, Esq., counsel for said intervenor, and cross-examined by Harry R. Archbald, Esq., Assistant United States Attorney for the Southern District of California, and said witness made answer thereto, and

the questions propounded by said counsel and the answers of said witness were then and there taken down in shorthand by Carrie M. Mandell, a stenographer, in my presence, and in the presence of said witness and said attorneys, and then reduced to writing. That said deposition, having been taken, was read over by said witness and corrected, subscribed and sworn to by him in my presence, and that the foregoing pages, Numbered 6, 7 and 8, together with Exhibit "A" and Exhibit "B" thereto attached, are said deposition.

Witness my hand and seal of office this 20th day of March, 1914.

[Seal]

C. K. SCHADE,
Notary Public in and for the County of Los Angeles,
State of California.

My Commission expires Oct. 28, 1916. [42]

[Deposition of George E. Platt.]

GEO. E. PLATT, being first duly sworn by said Notary Public, testified as follows:

Direct Examination by Mr. LLOYD.

Q. You are president of the Los Angeles Creamery Company? A. Yes, sir.

Q. I show you Exhibit "A" attached to this deposition, being taken, being a chattel mortgage for Five Hundred Dollars, secured by a lien upon the launch "Calypso." Did you attend to the making of that loan? A. I did.

Q. For what purpose, do you know, was that money loaned?

A. To make last payments on the boat so that he

(Deposition of George E. Platt.)

could get it into commission.

Q. I show you Exhibit "B" attached to said deposition, being a chattel mortgage upon the launch "Calypso" securing a promissory note for Three Hundred Dollars, dated September 16th, 1913. Did you attend to the making of said loan?

A. Yes, sir, I did.

Q. State, if you know, for what purpose that money was loaned.

A. It was to pay the premium due on the insurance placed on the boat.

Q. Did you or did Los Angeles Creamery Company at time of making said loans, or either of them, or since said loans and prior to the seizure of the "Calypso" by the United States, know of any illegal use or voyage said "Calypso" was to make or for [43] which it was to be used?

A. No. We did not.

Q. Did you or said company consent or connive at any illegal use or voyage by said boat, or lend money for such use? A. No.

Cross-examination by Mr. ARCHBALD.

Q. Do you know who was in charge or master of said boat at time of seizure? A. I do not.

GEO E. PLATT received this deposition after it had been written and carefully read same, whereupon said witness signed the same.

GEO. E. PLATT.

Subscribed and sworn to before me this 20th day of March, 1914, at Los Angeles, California.

[Seal]

C. K. SCHADE,

Notary Public in and for the County of Los Angeles,
State of California. [44]

State of California,

County of Los Angeles,—ss.

I, C. K. SCHADE, a notary public in and for the County of Los Angeles, State of California, duly commissioned and sworn, being the commissioner authorized and agreed upon to take the foregoing deposition, do hereby certify that on the 18th day of March, 1914, beginning at the hour of ten o'clock A. M., at the law offices of Lloyd, Cheney & Geibel, Room 906 Central Building, Los Angeles, California, pursuant to said stipulation and agreement, there appeared before me Geo. E. Platt, a witness on behalf of the Los Angeles Creamery Company, intervenor in the above entitled matter, who was then and there by me duly sworn to testify the truth, the whole truth and nothing but the truth; that thereupon said witness was examined orally by Warren E. Lloyd, Esq., counsel for said intervenor, and cross-examined by Harry R. Archbald, Esq., Assistant United States Attorney for the Southern District of California and said witness made answers thereto, and the questions propounded by said counsel and the answers of said witness were then and there taken down in shorthand by Carrie M. Mandell, a stenographer, in my presence, and in the presence of said witness and said attorneys, and then reduced to writing. That said deposition, having been taken, was

read over by said witness and corrected, subscribed and sworn to by him in my presence, and that the foregoing pages, Numbered 10 and 11, together with "Exhibit A" and "Exhibit B" thereto attached, are said deposition.

Witness my hand and seal of office this 20th day of March, 1914.

[Seal]

C. K. SCHADE,

Notary Public in and for the County of Los Angeles,
State of California.

My commission expires Oct. 28, 1916. [45]

[Endorsed]: Opened and filed Apr. 27, 1914. W.
B. Maling, Clerk. By C. W. Calbreath, Deputy
Clerk. [46]

*In the District Court of the United States in and for
the Northern District of California, First Division.*

IN ADMIRALTY.

THE UNITED STATES OF AMERICA,

vs.

The Gasoline Launch "CALYPSO," Her Boats,
Tackle, Apparel, Furniture and Cargo.

Stipulation to Take Depositions [and Depositions].

It is stipulated that depositions may be taken in the above entitled matter on behalf of William L. Sassaman and William H. Singleton on Thursday the 9th day of April, 1914, beginning at the hour of 10 o'clock A. M. before C. K. Schade, a notary public in and for Los Angeles County, or before any notary public, at the law offices of Lloyd, Cheney and Geibel,

Room 906 Central Building, corner 6th and Main Streets, Los Angeles, California; that at such time the deposition of A. J. Stoecklin, Deputy Collector of Customs of the port of Los Angeles, or of any other person or persons as may be produced; that copies of the records of the Collector of Customs of the United States for the district embracing Los Angeles County may be proved or read into the evidence at such hearing; and that said depositions may be transmitted after certification to the Clerk of the above-entitled court and thereupon be opened by the United States Attorney and Commissioner herein and considered as evidence in this cause.

Dated: April 2d, 1914.

LLOYD, CHENEY & GEIBEL,
Attorneys and Proctors for Said Sassaman and Singleton.

JNO. W. PRESTON,
U. S. Attorney. [47]

In the District Court of the United States, in and for the Northern District of California, First Division.

IN ADMIRALTY.

UNITED STATES OF AMERICA,

vs.

The Gasoline Launch "CALYPSO," Her Boats,
Tackle, Apparel, Furniture and Cargo.

Depositions of Witnesses A. J. Stoecklin, Morris Pettenger, Louise E. Grimaud, Geo. E. Platt, and William L. Sassaman.

State of California,
County of Los Angeles,—ss.

BE IT REMEMBERED, that pursuant to the written stipulation of the parties in said action hereto annexed and made a part hereof by reference, and on Thursday, the 9th day of April, 1914, beginning at the hour of ten o'clock A. M., before C. K. Schade, a notary public in and for the County of Los Angeles, State of California, residing therein, duly commissioned and sworn, personally appeared A. J. Stoecklin, Morris Pettenger, Louise E. Grimaud, Geo. E. Platt and William L. Sassman, witnesses produced on behalf of William L. Sassaman and William H. Singleton, intervenors by petition in the above-entitled matter, and each of whom being by me first duly sworn, was then and there examined and interrogated by Warren E. Lloyd, Esq., of counsel for said intervenors, and was cross-examined and interrogated by Harry R. Archbald, Esq., Assistant United States Attorney, Southern District of California, of counsel for said United States, and respectively testified as follows:

Deposition of A. J. Stoecklin.

Direct Examination by Mr. LLOYD.

Q. What is your name, age and residence?

A. My name is Arnold J. Stoecklin, age 51 years,
[48] 118 East Eleventh Street, Los Angeles.

(Deposition of A. J. Stoecklin.)

Q. Are you in the employ of the United States Government?

A. No, sir. I sent in my resignation last Friday, and whether it is accepted or not, I do not know, but I sent it in.

Q. Before that, how long were you in the United States employ? A. Over ten years.

Q. In what capacity?

A. Different capacities. The last was deputy collector at San Pedro.

Q. For how long?

A. About two years and a month.

Q. During November, 1913, were you deputy United States Collector of Customs? A. Yes, sir.

Q. Do you know William L. Sassaman?

A. I met the gentleman; know him by sight.

Q. Do you know Morris Pettinger, who is present at this deposition? A. I know him by sight.

Q. The ship's papers of the "Calypso," that is to say the enrollment and license showing the master in charge have an entry thereon, dated November 24th, 1913, substituting Morris Pettinger as master in place of James K. Castle. Were you the officer attending to that entry? A. I was.

Q. Who came to you to procure that? [49]

A. Mr. Pettinger. The oath he had to take before I endorsed the license is at San Pedro office.

Q. Has it, or a copy thereof, been transferred to Los Angeles?

A. No, it stays at San Pedro, but Los Angeles is notified. All he had to do was to take the oath that

(Deposition of A. J. Stoecklin.)

he is a citizen, and then I endorsed him as master of the "Calypso" on the license. I know I signed him on the oath.

Q. Was William L. Sassaman present at that time? A. No, sir.

Q. State whether or not about March 30th, 1914, you signed a letter for William L. Sassaman to take to the United States Commission Krull at San Francisco. A. Yes.

Q. Prior to signing that letter, had you seen Mr. Sassaman with reference to transfer of the ship's papers? A. No, sir.

Q. What did Mr. Sassaman say to you about the transfer, if anything?

A. He said that he didn't make any transfer.

Mr. LLOYD.—That is all.

A. J. STOECKLIN received this deposition after it had been written and carefully read same, whereupon said witness signed the same.

ARNOLD J. STOECKLIN.

Subscribed and sworn to before me this 9th day of April, 1914, at Los Angeles, California.

[Seal]

C. K. SCHADE,

Notary Public in and for the County of Los Angeles,
State of California. [50]

State of California,
County of Los Angeles,—ss.

I, C. K. SCHADE, a Notary Public in and for the County of Los Angeles, State of California, duly commissioned and sworn, being the commissioner

authorized and agreed upon to take the foregoing deposition, do hereby certify that on the 9th day of April, 1914, beginning at the hour of ten o'clock A. M., at the law office of Lloyd, Cheney & Geibel, Room 906 Central Building, Los Angeles California, pursuant to said stipulation and agreement, there appeared before me A. J. STOECKLIN, a witness on behalf of William L. Sassaman and William H. Singleton, intervenors in the above-entitled matter, who was then and there by me duly sworn to testify the truth, the whole truth, and nothing but the truth; that thereupon said witness was examined orally by Warren E. Lloyd, Esq., counsel for said intervenors, and said witness made answer thereto, and the questions propounded by said counsel and the answers of said witness were then and there taken down in shorthand by Carrie M. Mandell, a stenographer, in my presence, and in the presence of said witness and said attorney, and then reduced to writing. That said deposition, having been taken, was read over by said witness and corrected, subscribed and sworn to by him in my presence, and that the foregoing pages, Numbered 2 and 3 are said deposition.

Witness my hand and seal of office this 14th day of April, 1914.

[Seal]

C. K. SCHADE,

Notary Public in and for the County of Los Angeles,
State of California.

My commission expires October 28, 1916. [51]

Deposition of Morris Pettenger.

Direct Examination by Mr. LLOYD.

Q. What is your name, age and residence?

A. Morris Pettenger, thirty, 1603 Alametos Avenue, Long Beach, California.

Q. Do you know William L. Sassaman?

A. Yes, sir.

Q. How long have you known him?

A. Three years.

Q. Are you now, or have you ever been part owner with him in the "Calypso"? A. Yes, sir.

Q. At the time the ship's papers were made out, I mean the consolidated enrollment and license, dated May 23d, 1913, did you own one-sixth interest in the "Calypso," and William L. Sassaman, five-sixths?

A. Yes, sir.

Q. Has that interest changed since? A. No, sir.

Q. Did you sign articles of agreement for the "Calypso," between you and William L. Sassaman, about August 10th, 1912? A. Yes, sir.

Q. Did you thereafter, about December 26th, 1913, sign an amendment to said articles in words and figures as follows:

Amendment to Articles of Agreement made August 10, 1912, for the "Calypso," between Wm. L. Sassaman and Morris Pettenger, both of Los Angeles, California.

This amendment made this twenty-third day of December, 1913, in consideration that Wm. H. Singleton agrees to pay promissory notes to the amount of \$3400.00 which amount clears the indebtedness of

(Deposition of Morris Pettenger.)

the "Calypso." I, Wm. L. Sassaman, and I, Morris Pettenger, agrees to give said Wm. H. Singleton a mortgage on the "Calypso" for the amount of \$3400.00 with interest at 8%, and deliver to Wm. H. Singleton the insurance policy [52] which amounts to \$5000.00, and further, that I, Morris Pettenger agrees to make no contracts or take the "Calypso" out on any trip without a permit from Wm. L. Sassaman, also that I, Morris Pettenger, agrees to borrow no money or give any personal note at any time on the "Calypso." It is also agreed that I, Morris Pettenger, shall not employ a crew without a permit from Wm. L. Sassaman, and under no circumstances shall the ship's papers be transferred to anyone except by Wm. L. Sassaman.

WM. L. SASSAMAN,

MORRIS PETTENDER.

Witnessed by LOUISE E. GRIMAUD."

A. Yes, sir.

Q. Did Miss Louise E. Grimaud witness that?

A. Yes. She asked me about it later.

Q. Do you remember a Creditor's Meeting that was to be held at the office of B. J. Bradner, Attorney, Security Building, Los Angeles, California, on December 23d 1913, where the creditors of the "Calypso" boat were to meet? A. Yes.

Q. Did you attend said meeting? A. No, sir.

Q. Who told you about it?

A. Mr. Sassaman, I believe, and Mr. Bradner.

Q. What was the general object of the meeting?

A. It was to make sort of an adjustment of the

(Deposition of Morris Pettenger.)

claims they had against the boat.

Q. About how much indebtedness was against the boat at that time?

A. Approximately for \$3400.00.

Q. Did William H. Singleton help you and Mr. Sassaman with that indebtedness? A. Yes.

Q. How? [53]

A. He was one of the endorsers of the notes that the creditors agreed to accept.

Q. Was this agreement above referred to signed in order to protect Mr. Singleton for what he was doing for you? A. Yes, I believe it was.

Q. You testified the Creditor's Meeting was held December 23d, was this amendment signed on that day or a few days afterwards?

A. It was signed later.

Q. How much later?

A. Possibly three or four days later; the 26th it was signed.

Q. You mean December 26th, 1913?

A. Yes, sir.

Q. You know of the "Calypso" having been seized at or near Monterey, California, by the United States Government? A. Yes, sir.

Q. At the time said amendment was signed, December 26th, 1913, was William L. Sassaman with you? A. Yes sir.

Q. Did he sign the same? A. Yes, sir.

Q. After signing the same and before said "Calypso" was seized, did you see Mr. Sassaman?

A. No.

(Deposition of Morris Pettenger.)

Q. At the time of signing said agreement, what did Mr. Sassaman say, if anything, about securing William H. Singleton.

A. Well, we agreed to give Mr. Singleton a mortgage on the boat for security for the \$3400.00. We also turned over the insurance policy. [54]

Q. Were the creditors pressing you at that time regarding the boat? A. Yes, sir.

Mr. LLOYD.—That is all.

Cross-examination by Mr. ARCHBALD.

Q. Who is Mr. Singleton?

A. Mr. Singleton, I understand, is a well to do rancher up near Redlands.

Q. Is he a friend of yours?

A. No, sir, he is a friend of my partner.

Q. Mr. Sassaman? A. Yes.

Q. Did you ever have any talk with him concerning this liability? A. No.

Q. The negotiations were all conducted through Mr. Sassaman? A. Yes, sir.

Q. All you know of it was through Mr. Sassaman?

A. Yes.

Q. Why was this amendment referred to signed on the 26th rather than the date of its making?

A. Because I was in San Diego.

Q. Were you with the boat in San Diego?

A. Yes.

Q. Was Mr. Sassaman on the boat with you?

A. No, sir.

Q. Were you in charge of the boat?

A. Yes, sir.

(Deposition of Morris Pettenger.)

Q. Before that time to and subsequent to the time of [55] signing this agreement?

Q. Yes, sir, in a general way.

Q. And there were no other parties interested in the boat, so far as ownership goes, other than yourself and Mr. Sassaman? A. No.

Q. What was the nature of this liability, concerning which this meeting was had?

A. It was concerning the indebtedness against the boat.

Q. How was it incurred?

A. For the construction of the boat.

Q. It represented then the difference between the cost of the boat and the money that was put up by you two owners? A. Yes.

Mr. ARCHBALD.—That is all.

MORRIS PETTENDER received this deposition after it had been written and carefully read same, whereupon said witness signed the same.

MORRIS PETTENDER.

Subscribed and sworn to before me this 9th day of April, 1914, at Los Angeles, California.

[Seal]

C. K. SHADE,

Notary Public in and for the County of Los Angeles,
State of California. [56]

State of California,

County of Los Angeles,—ss.

I, C. K. Shade, a Notary Public in and for the County of Los Angeles, State of California, duly commissioned and sworn, being the commissioner authorized and agreed upon to take the foregoing depo-

sition, do hereby certify that on the 9th day of April, 1914, beginning at the hour of ten o'clock A. M., at the law offices of Lloyd, Cheney & Geibel, Room 906, Central Building, Los Angeles, California, pursuant to said stipulation and agreement, there appeared before me Morris Pettenger, a witness on behalf of William L. Sassaman and William H. Singleton, intervenors in the above-entitled matter, who was then and there by me duly sworn to testify the truth, the whole truth and nothing but the truth; that thereupon said witness was examined orally by Warren E. Lloyd, Esq., counsel for said intervenors, and cross-examined by Harry R. Archbald, Esq., Assistant United States Attorney for the Southern District of California, and said witness made answer thereto, and the questions propounded by said counsel and the answers of said witness were then and there taken down in shorthand by Carrie M. Mandell, a stenographer, in my presence, and in the presence of said witness and said attorneys, and then reduced to writing. That said deposition having been taken, was read over by said witness and corrected, subscribed and sworn to by him in my presence, and that the foregoing pages, numbered 5, 6, 7, 8 and 9, are said deposition.

Witness my hand and Seal of Office, this 14th day of April, 1914.

[Seal]

C. K. SHADE,

Notary Public in and for the County of Los Angeles,
State of California.

My commissioner expires October 28, 1916. [57]

Deposition of Louise E. Grimaud.

Direct Examination by Mr. LLOYD.

Q. What is your name and where do you reside?

A. Louise E. Grimaud, 1417 Pleasant Avenue, Los Angeles, California.

Q. Do you know William L. Sassaman and Morris Pettinger?

A. I do in a business way. I have known Mr. Sassaman five or six years.

Q. Were you formerly in the employ of the Los Angeles Creamery Company?

A. Yes, sir, for seven years.

Q. Up to when?

A. I think about February 15, 1914. Since then I have not worked.

Q. Were Mr. Sassaman and Mr. Pettenger in the employ of the Los Angeles Creamery Company?

A. Mr. Sassaman was, and Mr. Pettenger was until—I don't know what time.

Q. Do you remember on or about August 10th, 1912, writing out articles of agreement for them to sign regarding the boat "Calypso"?

A. I do. Yes, sir.

Q. You were stenographer and typewriter?

A. Yes, sir. I wrote papers for them.

Q. Did they both sign it?

A. Mr. Sassaman signed, and Mr. Pettenger too.

Q. You signed as a witness?

A. I signed as a witness.

Q. Do you remember about December 23d, 1913, just before Christmas, writing out on the bottom of

(Deposition of Louise E. Grimaud.)

said articles an [58] amendment for Mr. Sassaman and Mr. Pettenger to sign?

A. Yes, sir, I do.

Q. Did they sign it?

A. Mr. Sassaman signed it.

Q. And did you sign as a witness?

A. I signed as a witness. Yes, sir.

Q. What was said at the time of having you write that about the agreement?

A. Well, I don't know whether anything was said, only that Mr. Sassaman asked me to write it, and that was all.

Q. Were you present when Mr. Pettenger signed it? A. No, sir, I was not.

Q. *Do remember* what day you wrote it?

A. It was before Christmas, I believe; it was the 23d of December.

Q. Do you know it was before Christmas?

A. I do know it was before Christmas.

Q. Did you ever meet Mr. William H. Singleton referred to in said agreement? A. No, I did not.

Q. Do you know anything about the debts of the "Calypso" and a creditor's meeting?

A. I do not.

Q. How long has Mr. Sassaman been in the employ of the Los Angeles Creamery Company?

A. As long as I can remember. He was there before I was.

Q. Did Mr. Pettenger acknowledge the signature of the amendment to you?

A. I saw the signature, but did not see him write

(Deposition of Louise E. Grimaud.)

it. [59] Later on he acknowledged that it was his signature.

Mr. LLOYD.—That is all.

Cross-examination by Mr. ARCHBALD.

Q. When you signed your name to the original agreement on the 10th day of August, 1912, how many signatures were there on the agreement at that time? A. There was only one.

Q. Whose name was it? A. Mr. Sassaman.

Q. And you did not see Mr. Pettenger sign the agreement? A. No, I didn't.

Q. And this amendment to the same articles of agreement made the 23d day of December, 1913, how many names were signed to that, and whose, at the time you signed as witness?

A. Only one name, Mr. Sassaman.

Q. And when was it that Mr. Pettenger acknowledged that his signature was on the agreement?

A. I saw the signature, I think, about four weeks ago—the signature of Mr. Pettenger—but since then he acknowledged it.

Q. But that was the first time you saw the signature to this amendment about three or four weeks ago? A. Yes, sir.

Q. How long did you say Mr. Sassaman has been working for the Los Angeles Creamery Company?

A. I couldn't say just how long, but it has been a long time. I have been there seven years myself.

Q. And he was working for that Company at the time these original articles and the amendment was signed? [60] A. Yes, sir.

Q. In what capacity, if you know?

(Deposition of Louise E. Grimaud.)

A. As a driver and collector.

Q. Did you see him every day nearly?

A. I could not say every day—I guess every day.

Q. And that was at and about the time the agreement was signed and subsequent to then as long as you have been in the employ of the company?

A. Yes.

Q. And when was it you left the employ of the company?

A. I could not say as to the exact date, but I believe it was about the 15th of February of this year. I have been sick since then, but will go back to work for them Monday.

Mr. ARCHBALD.—That is all.

LOUISE E. GRIMAUD received this deposition after it had been written and carefully read same, whereupon said witness signed the same.

LOUISE E. GRIMAUD.

Subscribed and sworn to before me this 9th day of April, 1914, at Los Angeles, California.

[Seal]

C. K. SCHADE,

Notary Public in and for the County of Los Angeles,
State of California. [61]

State of California,

County of Los Angeles,—ss.

I, C. K. SCHADE, a Notary Public in and for the County of Los Angeles, State of California, duly commissioned and sworn, being the commissioner authorized and agreed upon to take the foregoing deposition, do hereby certify that on the 9th day of April, 1914, beginning at the hour of ten o'clock A. M., at

the law offices of Lloyd, Cheney & Geibel, Room 906, Central Building, Los Angeles, California, pursuant to said stipulation and agreement, there appeared before me Louise E. Grimaud, a witness on behalf of William L. Sassaman and William H. Singleton, intervenors in the above-entitled matter, who was then and there by me duly sworn to testify the truth, the whole truth and nothing but the truth; that thereupon said witness was examined orally by Warren E. Lloyd, Esq., counsel for said intervenors, and cross-examined by Harry R. Archbald, Esq., Assistant United States Attorney for the Southern District of California and said witness made answer thereto, and the questions propounded by said counsel and the answers of said witness were then and there taken down in shorthand by Carrie M. Mandell, a stenographer, in my presence, and in the presence of said witness and said attorneys, and then reduced to writing. That said deposition having been taken, was read by said witness and corrected, subscribed and sworn to by her in my presence, and that the foregoing pages, numbered 11, 12, 13 and 14, are said deposition.

Witness my hand and seal of office this 14th day of April, 1914.

[Seal]

C. K. SCHADE,

Notary Public in and for the County of Los Angeles,
State of California.

My commission expires October 28, 1916. [62]

Deposition of George E. Platt.

Direct Examination by Mr. LLOYD.

Q. What is your name, age and residence?

A. George E. Platt, 52 years, 520 Ardmore Avenue, City.

Q. Are you president of the Los Angeles Creamery Company? A. Yes, sir.

Q. Do you know William L. Sassaman and Morris Pettenger? A. Yes, sir.

Q. Is Mr. Sassaman in your employ?

A. Yes, sir.

Q. Is Mr. Pettenger in your employ?

A. Yes, sir, temporarily.

Q. How long has Mr. Sassaman been in your employ? A. About ten years.

Q. With what companies?

A. With me personally on the ranch, then with the Belle Vernon Company, and on the absorption of the Belle Vernon Farms Company with the Los Angeles Creamery Company, he has been with the Los Angeles Creamery Company from that time on.

Q. Was Mr. Sassaman in your company's employ during November and December, 1913, and January and February, 1914? A. Yes, sir.

Q. In what capacity?

A. As a driver and collector of his route.

Q. Did he work steadily during those periods?

A. Yes, sir.

Q. Is he working now? [63] Yes, sir.

Q. Do you know whether your records show that he was at work from December 23d, 1913, to January 3d or 4th, 1914? A. Yes, sir, I do.

(Deposition of George E. Platt.)

Q. Have you recently examined the records?

A. Not right recently, but I verified it to my satisfaction.

Q. You would then state that he was at work during all of these days?

A. Yes, sir, the last part of December and all of January.

Q. In a former deposition, you testified regarding certain moneys loaned Sassaman and Pettenger on the "Calypso" boat, did you not? A. Yes, sir.

Q. Did you ever attend a creditor's meeting of the creditors of the "Calypso" boat some time in December, 1913? A. Yes.

Q. When and about when was that?

A. It was a little before Christmas. I do not remember what day—I have been informed on the 23d. I think my notice read on the 18th, if I recall correctly. A creditor's meeting up town to agree upon a certain arrangement of accepting notes from a party by the name of Singleton for our account, and I attended the meeting and notified them that we considered our mortgages satisfactory as secured. They asked me what about the open account, and I told them that we were willing to go in with the rest of them on that.

Q. I show you a letter from S. R. Hemenway, Cashier First National Bank, Redlands, dated November 25th, 1913, addressed [64] to William L. Sassaman. Have you ever seen that letter?

A. Yes, I think I saw this.

Q. Was that letter shown at that creditor's meeting? A. Yes.

(Deposition of George E. Platt.)

Q. Is that the Mr. Singleton that is referred to in that letter? A. Yes, sir.

Mr. LLOYD.—William L. Sassaman and William H. Singleton attaches to this deposition the letter referred to by said witness, and marks it Exhibit “A,” and makes it a part hereof.

(Said Exhibit “A” is hereto annexed.)

Q. Was the “Calypso” at that time in debt, as far as you know?

A. Yes, the combined indebtedness was approximately \$4000.00, including the indebtedness to the Los Angeles Creamery Company.

Q. This meeting you think was before Christmas, 1913? A. I know it was—I am sure it was.

Q. I believe you testified that from the time of that meeting or during the early part of January, Mr. Sassaman was continually in the employ of your company? A. Yes, sir.

Q. During that time, what were his hours of labor?

A. I think he usually took his wagon out about two o’clock in the morning. I am seldom down at that time, but that is the time. He might not get back until half past ten or eleven o’clock, owing to collections, and might get back as early as eight o’clock.

Q. Do these hours run pretty uniformly each day?

A. No they vary greatly. The latter part of the [65] month when there are less collections, the driver gets in earlier.

Mr. LLOYD.—Take the witness.

Cross-examination by Mr. ARCHBALD.

Q. What do you mean by continuously in your employ on these dates?

(Deposition of George E. Platt.)

A. That he was not off; that he was with us all the time.

Q. Every day?

A. Every day, driving his wagon Sundays and holidays the same.

Mr. ARCHBALD.—That is all.

Said GEORGE E. PLATT received this deposition after it had been written and carefully read same, whereupon said witness signed the same.

GEO. E. PLATT.

Subscribed and sworn to before me this 10th day of April, 1914, at Los Angeles, California.

[Seal]

C. K. SCHADE,

Notary Public in and for the County of Los Angeles,
State of California. [66]

[Exhibit "A" to Deposition of George E. Platt—
Letter, November 25, 1913, S. R. Hemingway, to
William Sassaman.]

No. 3892.

FIRST NATIONAL BANK OF REDLANDS.

Redlands, Cal., November 25, 1913.

F. R. Morrison, President.

S. R. Hemingway, Cashier.

H. R. Scott, Assistant Cashier.

Mr. Wm. Sassaman,

1158 San Pedro St.,

Los Angeles, Cal.

Dear Sir:

I have your letter of November 24th, regarding financial responsibility, and willingness to meet his

obligations, of Wm. H. Singleton, of El Casco. It gives me great pleasure to say to you that Mr. Singleton is absolutely good for anything that he may contract for, or any paper he may sign his name to. In fact, I will go so *far to* say that if at any time he could not pay, we would be, as a bank, willing to loan him the money to pay with. We consider him absolutely good, upright, straightforward, quick to meet all obligations, and very careful of his credit in every way. Good as gold.

It gives me pleasure to recommend him to you in this way, as I have known him over twenty years, and know about him.

Yours very truly,

S. R. HEMINGWAY,

Cashier. [67]

State of California,

County of Los Angeles,—ss.

I, C. K. Schade, a Notary Public in and for the County of Los Angeles, State of California, duly commissioned and sworn, being the commissioner authorized and agreed upon to take the foregoing deposition, do hereby certify that on the 9th day of April, 1914, beginning at the hour of ten o'clock A. M., at the law offices of Lloyd, Cheney & Geibel, Room 906 Central Building, Los Angeles, California, pursuant to said stipulation and agreement, there appeared before me Geo. E. Platt, a witness on behalf of William L. Sassaman and William H. Singleton, intervenors in the above-entitled matter, who was then and there by me duly sworn to testify the truth, the whole truth and nothing but the truth; that there-

upon said witness was examined orally by Warren E. Lloyd, Esq., counsel for said intervenors, and cross-examined by Harry R. Archbald, Esq., Assistant United States Attorney for the Southern District of California and said witness made answer thereto, and the questions propounded by said counsel and the answers of said witness were then and there taken down in shorthand by Carrie M. Mandell, a stenographer, in my presence, and in the presence of said witness and said attorneys, and then reduced to writing. That said deposition, having been taken, was read over by said witness and corrected, subscribed and sworn to by him in my presence, and that the foregoing pages, numbered 16, 17, 18 and 19, together with "Exhibit A" thereto attached, are said deposition.

Witness my hand and seal of office this 14th day of April, 1914.

[Seal]

C. K. SCHADE,

Notary Public in and for the County of Los Angeles,
State of California.

My commission expires October 28th, 1916. [68]

Deposition of William L. Sassaman.

Direct Examination by Mr. LLOYD.

Q. What is your name, age and residence?

A. William L. Sassaman, 34, 1158 San Pedro Street, Los Angeles, California.

Q. Were you present and did you hear the testimony of A. J. Stoecklin? A. Yes, sir.

Q. Is he the same person concerning whom you testified before Commissioner Krull in San Francisco recently? A. Yes, sir.

Q. State whether or not you ever consented before

(Testimony of George E. Platt.)

Mr. Stoecklin, or with any United States custom officer, as to the transfer of the ship's papers of the boat "Calypso," so as to make Morris Pettenger master in place of James K. Castle?

A. I never consented. Mr. Stoecklin testified that I did not.

Q. Did you ever consent or agree with Morris Pettenger, or any person, that said Morris Pettenger might be master of said boat "Calypso"?

A. No, sir. He could not be master either, because he was no seafaring man. Mr. Pettenger had never been to sea before he went on the "Calypso," and knows nothing about the sea—nothing about navigation.

Q. Did you hear the testimony of Louise E. Grimaud today? A. Yes, sir.

Q. State the circumstances under which Morris Pettenger signed the articles of agreement, dated August 10th, 1912, between you and him regarding the "Calypso." [69]

A. We drew these up together at the time we started in the business, and Pettenger agreed that they were correct. Miss Grimaud was the lady I got to typewrite and put them in proper form, and when they were finished we both signed them and she witnessed them and signed her name as a witness in 1912.

Q. You heard her testify that you signed first—how did that come?

A. I was manager of it, so I signed first.

Q. Did Mr. Pettenger sign about the same time?

A. He signed at the same time.

(Deposition of William L. Sassaman.)

Q. Do you remember whether or not you signed the amendment to said articles dated December 23d, 1913, before or at the same time Mr. Pettenger signed?

A. No, I signed them first.

Q. How soon after you signed, did he sign?

A. I signed them on the 23d when I had them made out and Pettenger signed them on December 26th, 1913.

Q. Do you know whether you were continually at work from December 23d, 1913, to and including January 3d, 1914, for Los Angeles Creamery Company?

A. Yes, sir, I was at work every day and half of the night.

Q. After Morris Pettenger signed that amendment to articles dated December 23d, 1913, up to the time the "Calypso" was seized by the United States, did you see the "Calypso"?

A. No, I didn't see her until April 1st, when I got to San Francisco.

Q. Did you know she was gone on any trip?

A. Yes, I knew she was gone.

Q. How did you know? [70]

A. I went to Long Beach and found she wasn't in the harbor. I made four trips down there every day for four days.

Q. Did you know why she was gone?

A. No, sir.

Q. Had you been told that she would go?

A. No, sir.

Q. Did you consent that she should go?

A. No, sir.

(Deposition of William L. Sassaman.)

Q. State fully and frankly whether or not after signing the amendment to the articles with Morris Pettenger, December 26th, 1913, you consented or connived in any manner to said boat leaving Long Beach harbor where she was tied.

A. I did not. I didn't know she was gone until I went down there and found out. I didn't know until Captain Connell told me that she left on January 3d, 1914.

Q. Did you, prior to the signing of said amendment to articles, December 26th, 1913, consent or agree or connive at said boat being at any time used for illegal purposes? A. No, sir.

Mr. LLOYD.—Take the witness.

Cross-examination by Mr. ARCHBALD.

Q. What was the boat used for at the time you built it?

A. It was used between San Pedro and Avalon, Catalina Island, continually every day.

Q. For what purpose?

A. For passengers up to about the first of October, when we quit.

Q. In whose charge was the boat at that time?

A. I ran it myself from May 11th when she started, and the masters that are mentioned on the ship's papers had charge [71] of her after that, except Pettenger—he was engineer continually.

Q. Were you on the boat yourself actually running it? A. Yes, sir.

Q. How long?

(Deposition of William L. Sassaman.)

A. From the time it started to the day—I can't say—it's on the ship's papers, when Lopez went in.

Q. How long was the boat operated between San Pedro and Avalon?

A. From May 11th—the first day, to about the first of October.

Q. Then what was done with it?

A. It was used from San Pedro to Long Beach—to the battleship "Pittsburg," gunboat "Yorktown," Chinese old junk ship "Ning Po," then on exhibition; other times working for the Roy C. Howell Company and private parties. They were all real estate people, but I don't know their names.

Q. Were you on the boat then, operating it personally?

A. Yes, sir. I took her out and handled the passengers myself.

Q. And how long did that last engagement continue?

A. I don't know what days they were; I could find out; I have records of them, but they have records of them on the boat. It was in November.

Q. And what, if anything, was the boat used for after November? A. Nothing.

Q. What was done with it?

A. It was tied up in the inner harbor of Long Beach.

Q. When was the first knowledge you had of the enrollment and license dated November 24th, 1913, substituting Morris Pettenger as master in place of James K. Castle? [72]

(Deposition of William L. Sassaman.)

A. I think it was March 7th. I went to the custom house in Los Angeles and Mr. Mahar told me.

Q. Had Mr. Castle been on the boat any of the time subsequent to or prior to November 24th, 1913?

A. Yes, sir.

Q. Both before and after that date?

A. I think not after—not after.

Q. Who was in charge of the boat after that day?

A. She was not working, she was tied up.

Mr. ARCHBALD.—That is all.

Redirect Examination by Mr. LLOYD.

Q. While you were operating the boat, were you also holding your position with the creamery company? A. Yes, sir.

Q. How could you do that?

A. I went out at two o'clock in the morning and if I got through by eight o'clock in the morning I went to San Pedro and took out the boat and would get back in the evening at 6:30 P. M. I did that all the time I was running that boat.

Said William L. Sassaman received this deposition after it had been written, and carefully read same, whereupon said witness signed the same.

WILLIAM L. SASSAMAN.

Subscribed and sworn to before me this 10th day of April, 1914, at Los Angeles, California.

[Seal]

C. K. SCHADE,

Notary Public in and for the County of Los Angeles,
State of California.

Mr. LLOYD.—We had intended taking the depo-

sition of William H. Singleton at this time, but in some way he has misunderstood the appointment. Having covered the matter of his helping [73] with the finances by other witnesses, we do not produce him.

Mr. ARCHBALD.—You may adjourn the deposition for that purpose if you wish.

Mr. LLOYD.—I fear there will not be time.

State of California,

County of Los Angeles,—ss.

I, C. K. SCHADE, a Notary Public in and for the County of Los Angeles, State of California, duly commissioned and sworn, being the commissioner authorized and agreed upon to take the foregoing deposition, do hereby certify that on the 9th day of April, 1914, beginning at the hour of ten o'clock A. M., at the law office of Lloyd, Cheney & Geibel, Room 906, Central Building, Los Angeles, California, pursuant to said stipulation and agreement, there appeared before me William L. Sassaman, a witness on behalf of William L. Sassaman and William H. Singleton, intervenors in the above-entitled matter, who was then and there by me duly sworn to testify the truth, the whole truth and nothing but the truth; that thereupon said witness was examined orally by Warren E. Lloyd, Esq., counsel for said intervenors, and cross-examined by Harry R. Archbald, Esq., Assistant United States Attorney for the Southern District of California, and said witness made answer thereto, and the questions propounded by said counsel and the answers of said witness were then and there

taken down in shorthand by Carrie M. Mandell, a stenographer, in my presence, and in the presence of said witness and said attorneys, and then reduced to writing. That said deposition, having been taken, was read over by said witness and corrected, subscribed and sworn to by him in my presence, and that the foregoing pages, numbered 21, 22, 23, [74] 24 and 25 are said deposition.

Witness my hand and seal of office this 14th day of April, 1914.

[Seal]

C. K. SCHADE,

Notary Public in and for the County of Los Angeles,
State of California.

My commission expires October 28, 1916.

[Endorsed]: Opened and Filed Apr. 27, 1914. W.
B. Maling, Clerk. By C. W. Calbreath, Deputy
Clerk. [75]

*In the District Court of the United States, in and for
the Northern District of California, First Di-
vision.*

UNITED STATES OF AMERICA,

vs.

The Gasoline Launch "CALYPSO," Her Boats,
Tackle, Apparel, Furniture, and Cargo.

Testimony Taken Before U. S. Commissioner.

Thursday, April 2d, 1914.

Counsel Appearing:

JOHN W. PRESTON, Esq., United States Attor-
ney, and WALTER E. HETTMAN, Esq., Asst. U. S.
Attorney, for the United States.

Messrs. BLACK & CLARK, and LLOYD, CHENEY & GEIBEL, appear for the claimant and intervenor, Los Angeles Creamery Company.

Messrs. LLOYD, CHENEY & GEIBEL, appear for the claimants and intervenors, William L. Sassaman and William H. Singleton.

The COMMISSIONER.—As I understand, this matter is referred to me as United States Commissioner to take the proofs and ascertain and report the facts as to the issues joined, if there are any issues joined, and as to the allegations contained in the libel of information.

Mr. LLOYD.—And affirmative matters in the answers.

The COMMISSIONER.—And affirmative matters in the answers. [76] It is stipulated that this is the order of reference; is that agreeable?

Mr. LLOYD.—Order of reference to take the proofs.

The COMMISSIONER.—To take the proofs and ascertain and report the facts?

Mr. LLOYD.—Yes.

Mr. HETTMAN.—I think there are certain depositions set up from Los Angeles to be opened at this time.

The COMMISSIONER.—Do you desire those depositions opened now?

Mr. LLOYD.—Yes, your Honor.

(The depositions are thereupon opened by the Commissioner.)

Mr. LLOYD.—The claimants and intervenors offer in evidence the depositions of the witnesses R. M.

Smith, William L. Sassaman and George E. Platt taken at Los Angeles, California, March 18th, 1914, before C. K. Schade, a Notary Public, and certified and returned with certain original exhibits, "A" and "B" attached.

The COMMISSIONER.—These depositions relate merely to the claimants, do they?

Mr. LLOYD.—These depositions prove two chattel mortgages and the nature of the claims for which they were given; the idea being to establish first of all as valid and subsisting recorded chattel mortgages, recorded with the Collector of Customs, and, secondly, to show their maritime nature and also the depositions show the good faith and innocence of the claimants with reference to the voyage resulting in the seizure; that is, as to whether the parties had any knowledge and so forth, and directly or indirectly participated in it.

Mr. HETTMAN.—I want to make a statement explaining what [77] we intend to show and what the statute provides. We have filed this libel of information under and by virtue of Section 10 of the Act of 1882 as amended by the Act of 1884 of the Treaty, Laws and Rules governing the admission of Chinese providing for the forfeiture and condemnation of the vessel. In our libel of information we have charged the violation of Sections 8, 9, 10 and 11. Section 8 provides a penalty for the failure to give a list of the Chinese passengers on board this vessel to any immigration official; and there was a violation of section 9 in that there was no examination what-

soever by any immigration official of the Chinese aliens on board touching their right or qualification to land.

Section 10 upon which we rely reads as follows:

“That every vessel whose master shall knowingly violate any of the provisions of this act shall be deemed forfeited to the United States, and shall be liable to seizure and condemnation in any district of the United States into which such vessel may enter or in which she may be found.”

Section 11 provides that any one who shall knowingly aid or abet the landing of any Chinese persons who are not entitled to land by law in the United States shall be guilty of a misdemeanor and liable for the penalty set forth in that section; and it is the contention of the Government that violation of Sections 8, 9 and 11 subject this gasoline launch to forfeiture and condemnation to the use of the United States.

Mr. LLOYD.—Would you like me to make my statement now briefly as to our position?

Mr. HETTMAN.—Yes.

Mr. LLOYD.—As to the facts which are if valid against claimants and in this examination I will use the word “claimants” meaning [78] also intervenors—the parties I represent are each claimants and intervenors, if valid against claimants we know nothing of and shall have as to that feature abide the proofs submitted by the Government except as to such as we may elicit upon cross-examination. In addition we affirmatively set up certain claims which we will contend would not in any event be reached

by the forfeiture in the nature of marine liens. In addition to that we set up a controlling ownership of the vessel without knowledge of any illegal use or voyage. In other words, that the vessel was stolen, and being a matter in which we participated in no way, and therefore as against us a forfeiture cannot be invoked. This will turn undoubtedly on the fact that these four sections each base their penalties on what the master of any vessel shall do in the premises.

Mr. PRESTON.—In other words, you contend the man who claims to be the master was not really the master, and that his action in the matter was unwarranted on one hand and the other as fraudulent.

Mr. LLOYD.—And void as against us.

Mr. PRESTON.—That will not dispense with our proof of what is necessary to be shown under the Statute.

The COMMISSIONER.—I will permit this to go in so that I may be advised of your contention.

Mr. PRESTON.—The chances are the real question will come upon your showing after we have made a *prima facie* showing.

[Testimony of Harry B. Blee, for the Government.]

HARRY B. BLEE, called for the United States. Sworn.

Mr. HETTMAN.—Q. Mr. Blee, you are connected with the Immigration service of the Southern District? A. Yes, sir.

Q. What is your official title?

A. Immigrant inspector. [79]

Q. In that capacity were you in any way watching the operations of the gasoline launch "Calypso"?

(Testimony of Harry B. Blee.)

A. Yes, sir.

Q. Will you relate at what dates you first began your observation of this "Calypso," and what you saw and took note of?

A. Well, I was called into Los Angeles and sent down to San Pedro on this particular detail in the latter part of December, 1913. We had information that the "Calypso" had made an attempt to buy a large quantity of oil from the Union Oil People in San Pedro and that they had failed to get credit, consequently that deal had fallen through, but the remark had been made that they would get the oil all right so we kept track of the boat, and found along about the second of January, as I remember it, 1914, she took something like 15 hundred gallons of distillate and a quantity of cylinder oil.

Q. At what place?

A. I believe they first started to get it from the Puente Oil Company first and then they got it from the Union Oil Company.

Q. At San Pedro?

A. Yes, sir, at San Pedro, and I was on the dock at the time she was putting this quantity of oil aboard, and was not known, and I made inquiry in a round about way as to what the oil was to be used for and learned the story was current among the oil dock employees,—that she was going out on a moving picture cruise and we watched the boat, and she finally left the San Pedro Harbor on the morning of the 3d of January of this year proceeding out to sea, and we watched her through glasses quite a

(Testimony of Harry B. Blee.)

while naturally presuming she had gone south to pick up Chinese. That was the last I saw of the boat at that time. I had information from Los Angeles after I had been detailed to come north that the boat had gone to Ensenada and had later returned to San Pedro and then returned again to Ensenada. [80]

Q. When was the next time you saw the boat?

A. The morning of the 17th of January, in Monterey Bay which time Inspector Chadney and myself boarded the boat.

Mr. PRESTON.—Q. January 17th, 1914?

A. Yes, sir.

Mr. HETTMAN.—Q. Relate what took place at that time. Did you see the boat late in the evening of January the 16th; that is, the night before?

A. No, sir, we were looking for her.

Q. Whereabouts were you looking for this boat?

A. We were out on Monterey Bay, Inspector Chadney and myself, in a boat we hired there for the occasion. We understood the "Calypso" was coming north with the Chinamen but owing to the severe storm that swept over the bay and owing to the fact we were almost swept ashore we were unable to hook up with the "Calypso" until the morning of the 17th, at which time we went aboard her in Monterey Bay and found Mr. Fox, Pettenger and Dave Main. We took them up town and they were held there in the Police station and Inspector Chadney and I later went back and searched the boat and found a number of Chinese articles aboard the boat. We found a map and we found some—

(Testimony of Harry B. Blee.)

Q. (Intg.) Before we take that matter up did you see any of the Chinese on the morning of the 17th? A. No, sir, I did not.

Q. Did you assist in apprehending any Chinese later?

A. Well, we made an investigation of the Chinese around Watsonville, but the party I was with did not apprehend any of these particular contraband Chinese although some were apprehended at San Jose, I believe, trying to get through on the train.

Q. Have you seen these Chinese or heard their statements, the Chinese people who were on board the ship?

A. I saw some of them over at Angel Island. [81]

Mr. PRESTON.—That is immaterial.

Mr. HETTMAN.—All we want now is as to what you saw on board and found on board the ship.

Mr. LLOYD.—I was wondering if he knew Chinese when he heard the Chinese himself?

A. You heard my name; I can pretty near give expert testimony on that.

Mr. HETTMAN.—Q. On your search of the ship did you find any license. I show you this license?

A. Yes, sir.

Q. Where was that?

A. It was in the pilot house.

Q. That bears the name of whom?

A. William L. Sassaman.

Q. And the date, June 8th, 1912? A. Yes, sir.

Mr. PRESTON.—Show it to the other counsel.

Mr. HETTMAN.—We offer that in evidence and

(Testimony of Harry B. Blee.)

ask that it be marked United States Exhibit "1."

(The paper is marked "United States Exhibit "1.")

Mr. HETTMAN.—That is a license of that date granting permission to Sassaman to serve as a master for a period of five years on vessels not more than 65 feet in length and so forth. It is simply a license.

Q. I will show you a steam license and ask you if you can identify that? A. Yes, sir.

Q. That was gotten where?

A. On the "Calypso" at the time we boarded her.

Mr. HETTMAN.—I submit that as Exhibit No. 2 and offer it in evidence.

(The paper is marked "United States Exhibit 2").

Mr. HETTMAN.—This framed license grants permission to Morris Pettenger to operate or navigate vessels not more than 65 feet in length for a period of five years and is dated the 23d day of May, 1913, and signed by James Guthrie, United States Local [82] Inspector of Hulls and Joseph P. Dolan, United States Local Inspector of Boilers.

Q. I will show you here an envelope with the enclosed documents and ask you if you can identify that? A. Yes, sir.

Q. Where was that found?

A. On board the "Calypso."

Q. Whereabouts?

A. If I am not mistaken it was in the pilot-house up over the wheel; I cannot recall the exact location of it, but it was aboard the boat.

(Testimony of Harry B. Blee.)

Mr. HETTMAN.—We offer that in evidence together with the endorsements on the back, both the envelope and document.

(The papers are marked “United States Exhibit 3”).

Mr. HETTMAN.—This is a permanent consolidated enrollment and license issued by the Department of Commerce and Labor, Bureau of Navigation, for the coasting trade, No. 18 of the gasoline screw steamer called the “Calypso” of Los Angeles, 33 gross, 22 net, issued at the Port of Los Angeles, California, May 22d, 1913.

The COMMISSIONER.—Confine the evidence here to the allegations of the information.

Mr. HETTMAN.—Q. I will ask you if you can identify anything in this envelope here that was on board the ship? A. Yes.

Q. Take it out so that we can see it?

A. It is quite a mess here.

The COMMISSIONER.—Q. What do you call it; what is it?

Mr. HETTMAN.—Q. Are those articles used by Chinese?

A. Yes, sir, they are common among Chinese; they all have them. This is some kind of a medicated pill, so I have been informed; I cannot say as to what its exact use is. [83]

Q. And there are Chinese papers there, are there?

A. Yes, sir.

The COMMISSIONER.—Q. There are papers there with Chinese characters on them?

(Testimony of Harry B. Blee.)

A. Yes, sir.

Mr. HETTMAN.—We offer the entire contents in evidence as Exhibit 4.

(The package is marked “United States Exhibit 4”).

Q. I show you further some letters and correspondence and ask you if you can identify those as things you found in the pilot-house?

A. Yes, sir, these were also in the pilot-house.

Mr. HETTMAN.—We offer these in evidence and ask they be marked Exhibit 5.

(The papers are marked “United States Exhibit 5”).

Q. And also a roll here, can you identify that?

A. That is a charted course presumably they came up on from Mexico to the California Coast, at least it shows a part of the Mexican Coast.

Q. That was found where?

A. In the pilot-house.

Mr. HETTMAN.—We offer this in evidence and ask it be marked Exhibit 6.

(The map is marked “United States Exhibit 6”).

Q. When you took these defendants into custody were any statements made to you by any one of them.

A. Not at that particular time, no, sir.

Q. You took into custody Fox, Pettenger and Main? A. Yes, sir.

Q. Were any statements made to you by Petten-ger?

A. No, sir not at the time they were taken into custody.

(Testimony of Harry B. Blee.)

Q. Later then?

A. Yes, sir, he made the simple statement that they had not been out of California waters. He made that statement in the Salinas County Jail. [84]

Mr. PRESTON.—Q. To you? A. Yes, sir.

Q. At the time that you saw them putting aboard this oil were any changes made in the hatchway of the vessel for the purpose of receiving that oil?

A. Yes, sir, they were cutting out the aft part of her cabin so they could get the oil down—they could not get the large drums of oil down, it was not big enough to get it in. They put sixteen 50 gallons of distillate aboard and some was put down in her cabin and some down through the forward hatch and some up in her bow and some on deck.

Q. Did you see anybody cutting it away?

A. Yes, sir, I saw some man working at it; I cannot say as to his exact name.

Q. Do you know any of them who were doing this work?

A. I cannot say who was exactly sawing and hammering, but Pettenger was around.

Q. Do you know Pettenger yourself?

A. Yes, sir.

Q. Morris Pettenger? A. Yes, sir.

Q. Do you know him now? A. Yes, sir.

Q. Do you know whether or not he was there at the time this was going on? Yes, sir.

Q. Do you know Fox? A. Yes, sir.

Q. Was he there?

A. I cannot say as to whether Mr. Fox was there

(Testimony of Harry B. Blee.)

or not there. I was not very close to the boat; I did not want to get very close to it.

Q. Do you know Sassaman?

A. If this is the man this is the first time I have ever seen him to know him (pointing).

Q. Did you see him around the boat?

A. No, sir, he was not there.

Q. For what period of time before this boat left the Harbor did you see them working on this hatch-way? [85]

A. I think that was about three o'clock on the second of January and she left the morning of the third about 10 o'clock.

Q. And this was at San Pedro Harbor?

A. Yes, sir, and then after they got the oil aboard of her she went up towards Wilmington and lay there that night. I did not go up, another man followed her up there; I did not go up.

Q. Where is Wilmington?

A. Towards Long Beach.

Q. About what distance?

A. I do not know; it is about three or four miles, I guess.

Q. You know positively that this is the same launch that you saw leave on January 3d, do you?

A. Yes, sir.

Q. And you saw it come into the harbor at Monterey?

A. No, sir, I saw it after it was in the harbor.

Q. You saw it after it was in the Harbor of Monterey? A. Yes, sir.

(Testimony of Harry B. Blee.)

Q. That is in the Northern District of California?

A. Yes, sir.

Mr. PRESTON.—That is all.

Mr. LLOYD.—No questions.

**[Testimony of William H. Chadney, for the
Government.]**

WILLIAM H. CHADNEY, called for the United States. Sworn.

Mr. PRESTON.—Q. What is your given name?

A. William H. Chadney.

Q. What is your official position in the Government service, if any? A. Immigrant Inspector.

Q. How long have you been there?

A. Over six years.

Q. Where are you stationed principally?

A. Monterey.

Q. Is that in the Northern District of California?

A. Yes, sir.

Q. Do you know anything about this gasoline launch known as the "Calypso"?

A. Yes, sir. [86]

Q. When did you first see it?

A. On the morning of the 17th of January, 1914, in the Harbor of Monterey.

Q. Is that the first time you had ever seen it?

A. Yes, sir.

Q. You were expecting it in the harbor at that time?

A. I was on board another small launch waiting for the boat to come in.

Q. Where did you first see her?

(Testimony of William H. Chadney.)

A. Near Chinatown.

Q. Is Chinatown in Monterey?

A. There is a fishing section there run by Chinese called Macalbe Beach.

Q. That was on the morning of January 17th, 1914.

A. Yes, sir.

Q. Did you go aboard the vessel at that time?

A. Yes, sir.

Q. Who did you find aboard?

A. We found Main, Fox and Pettenger.

Q. Do you know Morris Pettenger. A. Yes, sir.

Q. David Main? A. Yes, sir.

Q. And what is Fox's first name?

A. Fred Fox, I believe.

Q. What were they doing?

A. They were down below at the time lying down.

Q. What hour of the day or night was it?

A. It was about between the hours of four and six o'clock in the morning.

Q. In the morning you say? A. Yes, sir.

Q. How long was that after you first sighted her?

A. Possibly 20 minutes or 30 minutes.

Q. And soon after sighting her you went aboard?

A. Yes, sir.

Q. Did you see any evidence of there having been other people aboard her?

A. Yes, sir, we searched the boat and we found some Chinese clothing.

Q. Did you find all these exhibits? A. Yes, sir.

Q. You identify all the exhibits introduced in evidence as having been found on the boat?

(Testimony of William H. Chadney.)

A. Yes, sir.

Q. You assisted in searching at the time they were found?

A. Yes, sir, we found clothing; we found quite a lot of Chinese [87] clothing that was too filthy to hold; I had to throw it overboard.

Q. What kind of clothing, undergarments or outer-garments?

A. Outer clothing; regular Chinese clothes. They smelt so I could not keep them; I kept them as long as I could.

Q. Is that all you know about the matter?

A. No, sir; when I came up to Angel Island I was present when Mr. Fox identified two of the Chinese as having come along with him on the launch "Calypso" from Mexico.

Q. That is one of the men who were found aboard the vessel?

A. Fred Fox was found aboard the vessel?

Q. Is that man here? A. Yes, sir.

Q. He identified two Chinese as having been on the boat with him?

A. Came up on the boat. He also identified the Chinese who used the skiff between the "Calypso" and the shore.

Q. What do you know about the skiff having been used between the "Calypso" and the shore?

A. The boat could not have made connection with the shore except by a skiff; the beach there is too rocky for a large boat to go in there.

Q. Did you see the skiff around there?

(Testimony of William H. Chadney.)

A. No, sir.

Q. What did you say the Chinese name was who used the skiff, if you know? A. He did not know.

Q. What has become of all the Chinese?

A. He is now out on \$1,000 bail, I believe.

Mr. PRESTON.—That is all.

The COMMISSIONER.—Q. With reference to these Chinese that you say were identified as having been aboard that vessel and the other that got away, what became of those Chinese?

A. To the best of our knowledge they are scattered; they were taken away in automobiles.

Q. You say two were identified.

A. Yes, sir. [88]

Q. Has there been an investigation?

A. Yes, sir.

Q. What does it show?

A. I would have to refer to the record; I did not make it myself.

Mr. LLOYD.—No questions.

Mr. HETTMAN.—We have one of the defendants here who will take the stand.

[Testimony of Fred Fox for the Government.]

FRED FOX, called for the United States.
Sworn.

Mr. HETTMAN.—Q. Mr. Fox, you are one of the defendants in the case with David Main and Morris Pettenger?

A. I am not one of the defendants, I am one of the men who was on board the vessel; I don't know very much about the law.

(Testimony of Fred Fox.)

Q. Are you willing to make any statement here without any hope of award or without any promise of immunity whatsoever? A. I am.

Q. With the understanding we are not making any threats and without any hope of immunity whatsoever? A. Yes, sir.

The COMMISSIONER.—This is not a criminal proceeding.

Mr. HETTMAN.—I want him to understand.

Mr. PRESTON.—Q. You have no objection to making a statement?

A. No, sir, not in the least.

Q. You realize you do not have to unless you want to? A. I realize that.

Mr. HETTMAN.—Q. Mr. Fox, relate just what your operations were from the time you joined the “Calypso” in bringing up if at all any of the Chinese from Mexico to Monterey?

The COMMISSIONER.—Q. Tell the story in your own words?

A. Tell the story on that particular trip? [89]

Mr. HETTMAN.—Q. Yes?

A. As to dates I cannot remember the dates?

Q. Give them approximately. We do not want them specifically.

A. When I joined the “Calypso” for this trip I had made two or three trips on her before that; prior to this one, about a month Mr. Sassburg here came down and asked me who I was hired by and I says I was hired by his partner, Mr. Pettenger.

Q. That was about a month before?

A. Yes, sir, something like that; we were running

(Testimony of Fred Fox.)

out to a Chinese junk carrying passengers, and Mr. Sassburg he paid me off and took charge of the boat.

Q. You had been formerly employed by Pettenger?

A. Yes, sir.

Q. You understood Pettenger was the master?

Mr. LLOYD.—That is objected to—

The COMMISSIONER.—Yes. Let him tell his story.

Mr. HETTMAN.—Q. Tell your story.

A. Well, in two or three days, I don't just remember how long—I was working in Warner's Machine Shop on a little boat belonging to my brother, and Pettenger came over from Long Beach and came to me and wanted me to go out with a moving picture outfit. I told Pettenger I don't think Sassburg will like it, and I didn't want to have anything to do with Sassburg, and he says Sassburg has turned the boat over to me; he says, Sassburg has nothing to do with the running of the boat.

Mr. LLOYD.—Q. Do you mean Sassaman when you say Sassburg?

A. I mean this man here (pointing).

Mr. HETTMAN.—Q. It was simply the fact you were employed by Pettenger? A. Yes, sir.

Q. Tell about that.

A. We started in then to make this trip [90] with the moving picture people; so a little later he wanted me to go over and bring her down, he expected to get a crowd to go out with him on an excursion party, but they did not show *it*, it was a bad day or something and he told me about this Chinese man.

(Testimony of Fred Fox.)

Q. What was your capacity on the ship?

A. Engineer. He told me about this Chinese man. I acted as captain on the boat at times, and at times I acted as engineer; in small boats of that kind we take a turn wherever we happen to be needed; sometimes I was cook, deck hand or wherever I might be needed. He spoke to me about this man, and wanted to get a load right away, and told me the details, and wanted me to go with him. He told me there was a Chinese that he had already connected with or could connect with, or could get a load if he went right away and he wanted me to go with him. I told him I don't know nothing about it, I says, if you can see where it looks reasonable to get it through I will take a chance with you and see what we can do. Anyhow, we talked the thing over two or three times. The next thing I know my brother approached me about it and we all three talked it over together down at the slip at San Pedro. We talked the matter over, so then the next thing he told me was he was going to get some gasoline; he was going up to get some gasoline; the day he was going to get the gasoline I was fixing up the engine on my brother's boat; the result was, I think it was that day, he told me he could not get the oil, and he would have to see the Chinese again.

Mr. PRESTON.—Q. That is, Pettenger would?

A. Yes, sir; so then he said he was going to lay over another day and go and see Sassaman, his partner, and explain to him thoroughly what he was going to do; the trip he was going to make and so on.

(Testimony of Fred Fox.)

Q. About what date was that?

A. I could not tell you. I suppose [91] it was three days possibly before we left.

Q. Before you made the trip to Mexico?

A. Yes, sir, before we made the trip to Mexico.

Q. What was—

Mr. LLOYD.—(intg.) We move that everything he said he was going to say to Sassaman be stricken out as not proved whether it was made in his hearing, in his presence, or with his knowledge.

The COMMISSIONER.—We only want the facts.

Mr. HETTMAN.—Q. We would like to know what was said by Pettenger in the matter of the running of this ship; that is the particular point. We would like to know what Pettenger said to you in regard to his plans as to the management of the ship?

A. The day—I was going to say, when he came again he says, well, I have got everything fixed he says, I have seen him and he is thoroughly satisfied and will let us take a chance with the boat, he says, and I will put—

Mr. LLOYD.—We object to that absolutely as hearsay and incompetent irrelevant and immaterial to our clients.

Mr. PRESTON.—This is one of the owners of the boat.

The COMMISSIONER.—As against Pettenger. It looks to me as though it is material evidence. I will let it go in for what it is worth.

Mr. LLOYD.—We enter the objection to this as against Sassaman.

(Testimony of Fred Fox.)

Mr. HETTMAN.—Q. We wish to show who was manager of the boat. What was said?

A. He said he could not get the oil then, but he was going to get the money from the Chinaman; he said he would bring the Chinaman down aboard the boat and introduce the Chinaman to me in person and the Chinaman was to explain it all to us about it and at the same time he could get the money from the Chinaman. The Chinaman came down aboard the boat about two days or a day before [92] we got the oil.

Q. Where was this?

A. The boat was lying in the slip down at San Pedro. He came on board and we went down in the cabin and sat there and talked quite a while.

Q. What was the Chinaman's name?

A. Lee something; I would know it if I heard it, but I never heard it very many times and I do not remember his name very well. The Chinaman said yes, he would put up the money to buy the oil. I asked the Chinaman, I says, how much opium and how many people are we going to get if we make this trip. He says I will guarantee you 35. I looked right over and I said I think it is small to take such chances, if I go I want to go for everything in it, I said I would like to get a good load. He says, I cannot guarantee you over that; if we can get more we will take them; he says, I cannot guarantee you more than 30 or 35 people he said. In the meantime he gave Morris Pettenger the money and Morris Pettenger and myself went over to the Union Oil Company

(Testimony of Fred Fox.)

—what is that man's name, the big fellow who sells oil on the dock, Eugene. We went to Eugene first and Eugene himself was not there so Pettenger ordered the oil; we spoke about how much cylinder oil it would take and how much gasoline.

Mr. PRESTON.—Q. Who furnished you the money to get the oil with? A. I did not get the oil.

Q. Do you know how much money was furnished?

A. He furnished about, I think, \$120.

Q. How much did you pay for the oil, do you know about? A. I think about \$95.

Q. Did you see him pay for it?

A. I seen him pay; I did not see how much he paid.

Q. You saw the money passed?

A. Yes, sir. [93]

Q. How many days was this before you left?

A. The day we left port?

Q. Yes. A. The next day.

Q. Why didn't you go that day?

A. We had to cut in the hatchway to put the oil barrels down in the cabin. I had the saw and cut out the aft cabin myself and Morris Pettenger had the axe and he done the forward part of the cutting alone.

Q. Did you see Sassaman down there at any time after you engaged the last time? A. No, sir.

Q. Did you hear from him?

A. No more than what I told you.

Q. Nothing more than you heard from Pettenger?

A. Nothing more.

Q. You left this port when?

(Testimony of Fred Fox.)

A. We went up to Wilmington that night.

Q. What for?

A. He took the boat up there, he was going to get the ship's stores in Wilmington.

Q. Did you go up?

A. I did not go up there that night. I stayed in San Pedro that night and came up the next morning. He took the Chinaman on board that night.

Q. What Chinaman?

A. Lee. He told me the day before this, this Dave Main was sitting on the boat when this gentleman passed there, he told me what do you think about taking this Dave Main along with us.

Q. Dave Main did go? A. Yes, sir.

Q. Who else went? A. My brother Will Fox.

Q. Your name is Fred Fox? A. Yes, sir.

Q. Pettenger's name is Morris Pettenger?

A. Yes, sir.

Q. And Dave Main? A. Yes, sir.

Q. This Chinese Lee? A. Yes, sir.

Q. Anybody else? A. No, sir.

Q. What time did you leave Wilmington?

A. We must have left about 8:30. [94]

Q. In the morning? A. Yes, sir.

Q. Where is the first place you touched?

A. The first place we touched was, I should judge, about 12 or 15 miles this side of Ensenada, Mexico. It was so foggy we put to sea and lay off.

Q. Did you touch along the Mexican Coast first?

A. Yes, sir.

(Testimony of Fred Fox.)

Q. How long did you stay there before you landed?

A. We stayed three days at sea before we landed; we went in to land then and when we got in and landed—we found the place finally—Main was supposed to know the place to land—

Q. You were three days before you landed?

A. Yes, sir. ,

Q. And then you did land at this place 12 miles from Ensenada? A. About six miles.

Q. Did you get any Chinese?

A. Yes, sir, we got the Chinese at a little place called Sales Reyes; it is located this side of Ensenada.

Q. How many Chinese did you get? A. 16.

Q. Who went after them? Who put them on board? A. The Mexican man by the name of—

Q. (Intg.) Never mind if you can't recall it, I don't make any difference. Who was with you at the time they were put on board?

A. When they were put on board?

Q. Yes.

A. This Mexican and myself put the Chinese on board the boat.

Q. Where was your brother and Pettenger?

A. They were on board the boat. I would like to explain this.

Q. We don't want to hear all that. We want to show you brought illegal Chinaman in. That is all.

A. I helped put the Chinamen aboard the boat myself.

Q. You got 16 aboard?

(Testimony of Fred Fox.)

A. Yes, sir, 16 aboard and several cases of stuff. As far as seeing a can of opium I did not until I got to Monterey. I did see cans supposed to be opium in there. [95]

Q. You put some other stuff aboard with the 16 Chinese? A. Yes, sir.

Q. How many days had you been away from Wilmington before you got the Chinese, about how many days?

A. It must have been 8 days later the day we landed in Mexico; something like that.

Q. About 8 days? A. Yes, sir.

Q. What did you do with the Chinese after you got them?

A. We took them up to Port San Luis and lay there one night.

Q. Where is that?

A. It is about 40 miles this side of Conception.

Q. Where is Conception?

A. Point Conception is about 190 miles this side of San Pedro.

The COMMISSIONER.—Q. On the California coast? A. Yes, sir.

Mr. PRESTON.—Q. Port San Luis is where you first stopped? A. Yes, sir.

Q. Did you land any Chinese there?

A. No, sir.

Q. How long did you stay there before you went away?

A. We might have got there about seven or half past seven in the evening and left about four o'clock

(Testimony of Fred Fox.)

or half past four the next morning.

Q. How long were you out before you touched again? A. At about seven o'clock the next night.

Q. Where did you touch next?

A. The Standard Oil Company's dock at Monterey; we came up close to the dock and landed the Chinese.

Q. How did you land them? A. In a small boat.

Q. Whose boat?

A. I don't know the man's name who owned her.

Q. How many did you land; how many Chinese did you land? A. Sixteen.

Q. Did they or not include the Lee?

A. Without him. [96]

Q. Any Immigration inspector there?

A. No, sir.

Q. You were trying to avoid it?

A. Yes, sir, we were trying to avoid them; we came into Monterey just a little before dark.

Q. Were any of these Chinese inspected, examined or admitted by an Immigration official or inspector at all? A. No, sir.

Q. Any inspection made at all? A. No, sir.

Q. At no time was there an Immigration inspector aboard your vessel? A. No, sir there was nobody.

Q. You did not furnish a list of names to anybody?

A. No, sir.

Q. Did you have a manifest?

A. No, sir, we had no manifest that I know of.

Q. Where did you keep these Chinese?

A. Down in the cabin.

(Testimony of Fred Fox.)

Q. When you landed these Chinese did you land this other stuff you were talking about?

A. Yes, sir; then the box broke open and we put it in two sacks and the first boat that went ashore took one sack and the next time it went ashore it took the other sack; that was supposed to be opium.

Q. Did you see the cans? A. Yes, sir.

Q. Did it look like opium?

A. I never saw opium before; they told me it was opium; I did not cut them open; outside of that it was supposed to be opium.

Q. Who was the master of the vessel?

Mr. LLOYD.—We object to that.

Mr. PRESTON.—Q. Who was acting as master of the vessel?

A. Captain Pettenger and my brother and at times myself. Captain Pettenger was the man who bossed the boat, ran her and had charge of her.

Q. You saw this stuff introduced in evidence?

A. Yes, sir.

Q. Did you see that stuff aboard the vessel?

A. Yes, sir. [97]

Q. This stuff looks like Chinese?

A. That I did not see myself; the only stuff was the license and chart stuff like that I saw it.

Q. Who was on board the vessel at the time you were arrested?

A. Myself, Dave Main, Morris Pettenger and I think we were all asleep when the two gentlemen came aboard the boat.

Q. How long had it been since the Chinese were

(Testimony of Fred Fox.)

taken ashore at the time you were arrested?

A. I suppose five minutes.

Q. You landed them in the night? A. Yes, sir.

Q. What became of the Chinese after they were landed you do not know? A. I do not know.

Q. Have you seen any of these Chinese since you were arrested?

A. I have seen two and possibly three. Dave Main claims to have recognized—

Q. (Intg.) I did not ask you what Dave Main claims; did you see any?

A. I have seen three counting the fisherman that brought the boat out; I have seen three.

Q. Are you positive those three were on the boat?

A. Those Chinamen I have positively seen.

Q. Two of them as passengers and one brought the boat? A. Yes, sir.

Q. And you identified them at Angel Island?

A. Yes, sir.

Q. Are they now over there?

A. They are at Angel Island.

Q. You did not make any report of this bunch of Chinese you had aboard to anybody? A. No, sir.

Q. Did Pettenger or your brother or anybody make a report to the officers of the United States?

A. I think not, not to my knowledge.

Q. You knew these were Chinese who had no right to come into the United States? A. I did. [98]

Q. Did you talk it over with Pettenger?

A. Yes, sir.

Q. And with Fox? A. Yes, sir.

(Testimony of Fred Fox.)

Q. And you all knew you were trying to get Chinese into here in violation of law? A. Yes, sir.

Q. You expected to be paid for it? A. I did.

Q. How much did you expect to get out of it?

A. We expected to have \$3,400 out of the trip.

Q. How did you value your services, so much a head for the Chinese? A. So much a head.

Q. How much a head were you to get?

A. The way we were first supposed to get it was not so—we did not get so many Chinese so consequently we took \$3,400 for the bunch.

Q. Did you get \$3,400? A. No, sir.

Q. How much did you get?

A. I did not get nothing.

Q. Did anybody?

A. I don't know; I don't think they did.

Q. Who was to pay the money?

A. This Chinaman Lee; whether he paid my brother or not, I do not know; I have never seen him since.

Q. Where is your brother? A. I don't know.

The COMMISSIONER.—Q. Did he get away?

A. Yes, sir. He went up with the Chinese and he never came back.

Mr. PRESTON.—Q. Did you ever talk to Lee about paying you? A. Since then?

Q. Yes.

A. I have never seen him; I would like first rate to see him.

Q. Did Pettenger in your presence receive any money? A. No, sir.

(Testimony of Fred Fox.)

Q. Did you see anybody receive money?

A. Outside of Pettenger receiving some money in the cabin of the boat and I received some, \$30 in Mexican money.

Q. Who gave you that in Mexican money?

A. The Chinaman did.

Q. The Chinaman Lee? A. Yes, sir. [99]

Q. This money paid to Pettenger in the cabin, what was that for?

A. American gold to buy the oil.

Q. You do not know how much it was?

A. I seen him hand Pettenger the money.

Q. Did you hear him talk about what to do with it?

A. Yes, sir, it was to get the oil; Pettenger thought he could get the oil on credit; he could not do it.

Q. What does this Chinaman, Lee do?

A. He told me he had a ranch up near Watsonville or Monterey.

Q. Did he tell you what to do with the Chinese?

A. Bring them up to the ranch; we could not make any other landing, it was too rough, so we put into Monterey.

Q. How were you to divide the money?

A. We were to divide it equally outside of Dave Main, he was paid a salary.

Q. How much did you pay him?

A. On that trip coming up it turned out he was sea sick and a pretty poor helper; I was for my part pretty well disgusted with him.

Q. Did you pay him anything?

(Testimony of Fred Fox.)

A. I do not know if he got a cent.

Q. How much were you to get for the opium?

A. \$3,400, for the lay out.

Q. Who agreed on the \$3,400?

A. I think Pettenger and Fox agreed on the \$3,400.

Q. Suppose you had not landed, what was the agreement?

A. I don't know. Pettenger and him were together a great deal of the time and done their business together, and my brother and Pettenger stood much better together than me, because I got pretty sore at my brother and Pettenger for the treatment I got in Mexico.

Q. Did you ever see Sassaman in this boat?

A. I did.

Q. When was the last time you ever saw him?

A. I am not good at dates; the last time I seen Sassaman he and me [100] had a jangling with each other running out to the Chinese junk.

Q. You were fussing?

A. Yes, sir, he paid me off and fired me ashore.

Q. How long before you left on this trip?

A. A month or six weeks.

Q. Do you know anything about the landing—

The COMMISSIONER (Intg.) Q. Was Petten-
ger aboard when this happened? A. Yes, sir.

Mr. PRESTON.—Q. When you had the contro-
versy with Sassaman? A. Yes, sir.

Q. What capacity was he working at that time?

A. At that time he was engineer; we had two cap-
tains in the pilot-house and we could not agree.

(Testimony of Fred Fox.)

Q. Who were the two captains?

A. I was acting captain and he was trying to act as captain, so he paid *he* off and put me ashore and he acted as captain.

Q. Did you ever know of any change being made in the mastership of this vessel?

A. I did not. He told *he* he had full charge of the management of the vessel; that is all I know about it.

Q. Do you know a man named Dickason or Dickerson; Oren H. Dickason? A. I do not.

Q. Do you know a man named Castle?

A. I do.

Q. What was he?

A. He was captain of the boat for two or three days only.

Q. What became of him?

A. He has gone to Great Falls, Montana.

Q. Do you know who procured him to become captain of this boat? A. I could not say as to that.

Q. He was only there for a few days?

A. I think so.

Q. Do you know who owns this boat?

A. So far as I know Pettenger and this man Sassaman seemed to be the owners as far as I ever [101] heard of.

Q. You were not present when Pettenger signed up to become master of this boat?

A. No, sir. He showed me the papers that he had signed on as master of the boat.

Q. Is that the paper? (Handing.)

(Testimony of Fred Fox.)

A. Yes, sir.

Mr. HETTMAN.—Q. Did he say anything further at that time?

A. He said he had arranged with this gentleman here to handle and manage the boat.

Q. Was his action an entire sanction in every way?

A. Yes, sir. I told him about going to work down there, if I would go on he would keep me off as before. He says then, "I am in charge of the boat; it will be all right." We made a trip and went out with the moving picture people.

Q. As I understood, neither you nor any of the other men in the boat furnished to the Government any kind of passenger list?

A. Not to my knowledge.

Q. Could they have done so? A. No, sir.

Q. You did not prepare a list? A. No, sir.

Q. Did anybody know the names of the Chinese?

A. No, sir.

Q. Did you know? A. No, sir.

Q. Was any list prepared? A. No, sir.

Q. Any paper or other written document prepared with reference to the Chinese?

A. No, sir, I do not think so.

Q. Why did you not tell the immigration inspectors when they came aboard and arrested you about the Chinese?

A. They came on board and wanted to know where the Chinese was and we just laughed at them; and we would not tell them nothing; we joshed back and forth and they wanted to know where the opium

(Testimony of Fred Fox.)

and Chinese was and we would not say.

Q. Did you deny there was any Chinese at first?

A. Yes, sir. [102]

Q. In the presence of Pettenger?

A. Yes, sir, we denied ever having anything to do or anything of the kind.

Q. How many times had you been out as master with Pettenger before? A. I was not master.

Q. When he was master and had this license paper here?

A. Possibly twice or three times after he had become master of her. I made a trip to San Diego with him.

Q. You say you made two or three trips when he was master of the vessel? A. Yes, sir.

Q. He had this same paper that he has now?

A. Yes, sir.

Q. Did anybody make any question as to whether or not he was master?

A. No, sir. He took the boat and went down to San Diego. I do not remember how long he stayed, about a week, with a fellow named Garibaldi, and they went after a load at that time but did not get it, and Pettenger brought the boat back.

Q. Did Sassaman or anybody else ever make any objection to Pettenger running the boat in your presence? A. He never did.

Cross-examination.

Mr. LLOYD,—Q. You said that Sassaman came down when you were on the boat there and fired you off and you were jangling about it?

(Testimony of Fred Fox.)

A. He paid me off the middle of the day; he paid me for one-half day's work.

Q. And Pettenger was there? A. Yes, sir.

Q. In other words, he exercised the authority of owner over the boat? A. At that time?

Q. Yes. A. Yes, sir.

Q. You knew that the ship's papers showed Sassaman owned $\frac{5}{6}$ ths and Pettenger owned $\frac{1}{6}$ th?

A. I heard that.

Q. You always understood Mr. Sassaman owned $\frac{5}{6}$ ths? A. Yes, sir. [103]

Q. What time was this trip down to San Diego that you spoke of?

A. I don't remember, but I can look it up and find out.

Mr. PRESTON.—Q. At what time?

A. It must have been just before Xmas; we went down there sometime like that, just before Xmas, because I think she came back on Xmas day.

Mr. LLOYD.—Q. Didn't she get back the day before Xmas and go to Long Beach Harbor and tie up?

A. That is what I say, Xmas day or the day before.

Mr. HETTMAN.—Q. What trip?

A. This is the trip she went down there, my brother Pettenger and Garibaldi.

Q. Where did you take her to that time?

A. I was not with him. They went down there and could not find a landing or make connections. I do not know, they told me they could not make no connections.

(Testimony of Fred Fox.)

Mr. LLOYD.—Q. The boat at that time came back and was tied up in Long Beach Harbor?

A. The boat came back from the trip down to San Diego and my brother and Garibaldi got off at San Pedro and me and Pettenger took her over to Long Beach.

Q. That was just before Xmas?

A. I think it was.

Q. Is not that the last time you know of Pettenger taking the boat out until this trip to Ensenada?

A. No, sir, it is not. We made a trip over to San Pedro. We went over and got her and brought her over to San Pedro expecting to take an excursion party out and it rained; they did not show up.

Q. Where were you going?

A. Over to the island from San Pedro. They did not show up, and I helped take the boat back again.

Q. You simply helped take the boat back again?

A. Yes, sir.

Q. Sassaman was not there? A. No, sir.

Q. Don't you know that Pettenger told you that Sassaman was consenting to this so that you would not have other trouble with him [104] as owner?

A. That I could not say. I told him I did not want to have anything more to do with working on the boat; I did not want to get into any trouble with him; we had our words and there was no use having any more. He told me he had arranged everything, I am captain of the boat; he has nothing further to do with it at all outside of he is my partner. Then he also told me before going to Mexico, I am going

(Testimony of Fred Fox.)

to go and see if he is satisfied with the deal.

Q. Don't you know as a matter of fact, he did not leave there just before that trip?

A. I don't know that.

Q. Weren't you there?

A. I was right there in San Pedro; so far as knowing where Pettenger was, I don't know. The day before we took oil Pettenger was gone all day some place; where he was, I don't know. He told me he went to Los Angeles and saw his partner there, I don't know where he was. I was not with him.

Q. You did not see him go either way?

A. I don't know where he went; I know he was gone.

Mr. LLOYD.—That is all.

Mr. PRESTON.—Is it stipulated this vessel has been seized and is in the custody of the United States Government?

Mr. LLOYD.—An attempt at seizure and is in the custody of the marshal.

The COMMISSIONER.—Under process of this court.

Mr. PRESTON.—You do admit she has been libeled and is now in possession of the United States Marshal and under this proceeding.

Mr. LLOYD.—That is admitted in our answer, yes.

Mr. PRESTON.—We rest. [105]

[Testimony of William L. Sassaman for Claimants.]

WILLIAM L. SASSAMAN, called on behalf of the claimants, sworn.

Mr. LLOYD.—Q. I show you a writing dated the

(Testimony of William L. Sassaman.)

23d of December, 1913, signed William L. Sassaman and Morris Pettenger and witnessed by Louise E. Grimand—

A. Louise E. Grimaud is the stenographer.

Q. (Contg.) —reading as follows:

“This Amendment made this twenty-third day of December, 1913, in consideration that Wm. H. Singleton agrees to pay promissory notes to the amount of \$3400.00 which amount clears the indebtedness of the ‘Calypso.’ I, Wm. L. Sassaman, and I, Morris Pettenger, agrees to give said Wm. H. Singleton a mortgage on the ‘Calypso’ for the amount of \$3400.00 with interest at 8%, and deliver to Wm. H. Singleton the insurance policy which amounts to \$5,000.00, and further, that I, Morris Pettenger agrees to make no contracts or take the ‘Calypso’ out on any trips without a permit from Wm. L. Sassaman, also that I, Morris Pettenger agrees to borrow no money or give any personal note at any time on the ‘Calypso.’ It is also agreed that I, Morris Pettenger, shall not employ a crew without a permit from Wm. L. Sassaman, and under no circumstances shall the ship’s papers be transferred to anyone except by Wm. L. Sassaman.”

Q. Is that your signature? A. Yes, sir.

Q. Do you know Morris Pettenger’s signature?

A. Yes, sir.

Q. Is that his signature?

A. He signed that.

Q. Did you see him sign it?

A. Yes, sir, he signed that before a witness.

(Testimony of William L. Sassaman.)

Q. What were the circumstances under which you signed that?

A. That was the agreement that we had when Mr. Singleton agreed to pay off the indebtedness of the "Calypso." [106]

Q. What condition was the boat in at that time with reference to operating her?

Mr. PRESTON.—We don't object to this testimony being heard, but we want it understood that we are objecting to it and we would like to have the record show we object to this testimony on the ground it is incompetent, irrelevant and immaterial and upon the further ground that this is a proceeding *in rem* known as a condemnation proceeding wherein the claim of an innocent mortgagee is of no avail, and we make the further objection that all this testimony is incompetent, irrelevant and immaterial, and being a condemnation proceeding it matters not whether the parties were innocent or not innocent as long as this boat was used by the master for violating the immigration law of the United States.

The COMMISSIONER.—Of course, my conclusions on the facts I find I suppose that it would be proper for me to rule on this.

Mr. PRESTON.—You can reserve your ruling until you get ready.

The COMMISSIONER.—The only question about this is there has been some little informality with reference to the reference in this matter, and as I stated at the opening I understood the cause was referred to me to take the proofs and ascertain and

(Testimony of William L. Sassaman.)

report the facts as to the issues joined and as to the allegations in the libel of information.

Mr. PRESTON.—We are perfectly willing to have the evidence admitted and make your findings under the power the Court has given you under your reference.

The COMMISSIONER.—I will let the matter go in for what it is worth.

Mr. LLOYD.—We, of course, are directing this proof to the issues raised by our answers.

The COMMISSIONER.—I understand. [107]

Mr. LLOYD.—Q. State why you were tying up the boat at that time?

A. I was not tying it up, but my creditors were.

Q. Why was this agreement signed, in order that you might get the money from Mr. Singleton?

A. This agreement was signed because I paid off personal notes of Morris Pettenger, and then he hired men I did not want on the "Calypso." I told him he had no right to hire men and we had to have an agreement that he could not hire men.

Q. You put it in writing in this form?

A. Yes, sir.

Q. Have you ever changed the form of that?

A. No, sir.

Q. You heard the testimony of Fox?

A. Yes, sir.

Q. Did Pettenger come up and ask you about this trip, going to get Chinese; did he ask your consent?

A. No, sir, he did not.

Q. Did he speak to you about it?

(Testimony of William L. Sassaman.)

A. He did not.

Q. This is the Articles of Agreement originally signed August 10th, 1912, also having the signature of William L. Sassaman and Morris Pettenger and witnessed by Louise Grimaud, and in the original agreement they specified that Morris Pettenger was to pay one-third for the construction of the vessel and by paying \$1,666.67 more would own a one-half interest. Was that later superseded?

A. That was a form that Pettenger and I agreed on. He said he would put up so much money and I paid for this. When it came down to the time Pettenger could not put that amount of money up. I had to pay for all of the other and I owned $\frac{5}{6}$ ths and Pettenger owned an interest of $\frac{1}{6}$ th.

Q. These papers you have referred to—

The COMMISSIONER.—Do you want to vary the terms of these agreements?

Mr. LLOYD.—I want to show what he stood on.

The COMMISSIONER.—They are not in evidence. [108]

Mr. LLOYD.—I will put them in evidence.

Q. Exhibit 3, Consolidated certificate of enrollment and license shows that on May 22d, 1913, you owned $\frac{5}{6}$ ths and Pettenger owned $\frac{1}{6}$ th?

A. Yes, sir.

Q. Has Pettenger acquired any greater interest since that time? A. No, sir.

Q. Has your interest been diminished?

A. No, sir.

Q. On the same Exhibit 3 there is a transfer, No-

(Testimony of William L. Sassaman.)

vember 24th, 1913, at Port Los Angeles, California, reading:

“Morris Pettenger having taken the oath required by law; is at present master of the within named vessel, in lieu of James K. Castle, late master. A. J. Stoecklin, Deputy Collector of Customs.” Did you consent to that transfer?

A. The deputy collector did it, I was not present.

Q. When did you first learn of it?

A. March 7th, 1914.

Q. How?

A. I went to Mr. Mahar who is the head man of the records and he said to go to San Pedro and ask Mr. Stoecklin because the transfer was made there. Mr. Stoecklin said that Pettenger had come to him and had it transferred, that he was managing owner.

Q. Then what did you say?

Mr. PRESTON.—Objected to as incompetent, irrelevant and immaterial what he said.

Mr. LLOYD.—This is the first discovery.

Mr. PRESTON.—Who did he say it to; it is not admissible in evidence.

Mr. LLOYD.—The answer was in; this has come to our knowledge since the answer was in.

Q. What did you say to the collector when you learned that? [109]

A. He told me he had just supposed without looking up the records that Pettenger had a right to do this; he had the ship's papers and transferred it to Pettenger.

Mr. PRESTON.—We move to strike that last part

(Testimony of William L. Sassaman.)

of the answer out, what the deputy collector told him has nothing to do with the case.

Mr. LLOYD.—Q. What did you say to the deputy collector?

A. I said he should not have done that. He says if I asked him any questions right there I would get licked. That is what he told me.

The COMMISSIONER.—That is not evidence. If you want to prove those facts you would have to have the parties here.

Mr. LLOYD.—We have here a stipulation to take the evidence of Mr. Stoecklin and we shall ask at the close of the evidence here today that the case be left open to that extent.

The COMMISSIONER.—Of course, you can prove those facts by a witness who knows something about it. Proceed.

Mr. LLOYD.—Q. This transfer was dated November 24th, 1913, and on the 23d day of December, 1913, was this paper signed? A. Yes, sir.

Q. At that time did you know that the ship's papers had already been transferred to Pettenger?

A. No, sir, I did not.

Q. Tell us of the plan regarding the tying up of the boat at Long Beach and leaving her there. Why was she not running?

A. My creditors would not let the boat go out until I had paid up. That was the reason she was tied up.

Q. When was the boat first tied up at Long Beach?

A. When the season closed at Catalina.

Q. You heard Mr. Fox testify he got back to the

(Testimony of William L. Sassaman.)

boat before Xmas. Do you remember the circumstances of their going to San Pedro?

A. Pettenger? [110]

Q. Yes?

A. I do very distinctly. At that time Mr. Singleton whom I went to see lived in the Coast Range Mountains about 75 miles from Los Angeles, and he said he would take up that interest in the "Calypso" and we would have a creditors' meeting on the 23d of December when those papers were made up and Pettenger said he would come up to Los Angeles and be present and the creditors were present. We had the meeting and Pettenger did not show up. On the 26th, the day after he came to Los Angeles and I asked him why he did not show up at the meeting. I told him I had to stand there and straighten it with all of the creditors when he had personal notes I had to stand for. He said he had been to San Diego and I says what for. He says I thought I might get a job down there I heard of. He says, it rained on Xmas and they would not go out. I says what right did you have to take the boat out and he said he had no right, he just got an order and thought he would go; he had no time to come to see me.

Q. Did you consent to his going to San Diego on that trip? A. I never saw him.

Q. After the boat was tied up at San Pedro after that meeting with the creditors did you at any time consent to his taking the boat out? A. No, sir.

Mr. LLOYD.—We offer in evidence the Articles

(Testimony of William L. Sassaman.)

of Agreement and the amendment thereto as Claimants Exhibit "A."

Mr. PRESTON.—Objected to on the ground already stated, to wit, it is not germane to the issues in the case.

(The papers are marked "Claimants Exhibit A.").

Mr. LLOYD.—Q. Did you at any time consent that Morris Pettenger be made the master of the "Calypso"?

A. No, sir, I did not consent to Morris Pettenger, because Pettenger never knew anything or never went to sea; he was merely a gasoline engineer; he will testify to that himself. [111]

Q. During the month of January, 1914, was Morris Pettenger master of this vessel?

Mr. PRESTON.—Objected to on the ground the record is the best evidence.

A. No, sir.

Mr. LLOYD.—Q. Did you during January, 1914, or prior thereto consent that either Pettenger or Fox, who testified here, or his brother or Main could have charge of said vessel or make any trip with it?

A. No, sir, I did not know them, although I knew Mr. Fox, having put him off the boat.

Q. How many of those parties did you know?

A. Mr. Fox.

Q. And Mr. Pettenger? A. Yes, sir.

Q. Did you consent that either of them should take a trip in that boat in January, 1914? A. No, sir.

Q. Did you know anything of the trip they took until the seizure of the vessel? A. Yes, sir.

(Testimony of William L. Sassaman.)

Q. What?

A. I went to Long Beach to take down a can of brass polish and the boat was gone and I got word the inspectors were laying for the "Calypso."

Q. What were you taking the brass polish down there for?

A. Pettenger ordered it. I thought he was waiting for it and took it down.

Q. What was that used for?

A. It is used on ships for brass polishing.

Q. Keep it in condition? A. Yes, sir.

Q. At the time he ordered it, did Pettenger say anything about getting back? A. Yes, sir.

Q. Were you surprised when the boat was gone?

A. I must have been.

Q. Answer the question yes, or no. A. Yes, sir.

Q. What did you do then?

A. I went down three days afterwards [112] and I noticed men down there and they told me inspectors were after the boat and I said I did not believe it could be true. I believe they said it was all around that Pettenger was out to do crooked work, by men very well known and also seafaring men at Long Beach.

Q. When did you next see the boat or Pettenger after that?

A. I saw the boat when I first came in San Francisco, on Wednesday morning.

Q. When did you first see Pettenger after that?

A. Pettenger, I understand, was admitted to bail about a month after he had been arrested and when

(Testimony of William L. Sassaman.)

I found out he had been out of jail for a week I went to see him because he never showed up. I could not find him, and I left word with his father and mother at Long Beach for him to come and see me and he did; the date I cannot say.

Q. What did you say to him when you first saw him?

A. I told him I wanted the story what he did.

Q. Did he say anything about having gotten your consent?

Mr. PRESTON.—Objected to as incompetent, irrelevant and immaterial and hearsay and as self-serving.

Mr. LLOYD.—Q. State whether or not you repudiated his act when you saw him.

Mr. PRESTON.—Objected to for the same reason.

A. I did.

Mr. LLOYD.—Q. What did you say to him in regard to taking the vessel?

A. I merely stated if he understood the seriousness of what he was charged with; that he ruined me entirely and Mr. Singleton who had befriended us, paid up our debts.

Q. State whether or not the vessel was stolen from you when it was taken on this trip. [113]

Mr. PRESTON.—Objected to for the same reason.

A. It was stolen.

The COMMISSIONER.—That is merely his conclusion. The facts are only what we can determine; the finding will be made on the facts and not the conclusions.

(Testimony of William L. Sassaman.)

Mr. LLOYD.—Q. What was the fact with reference to your orders about the vessel which would show whether or not it was taken from you by your consent, or was stolen?

A. On the ship's papers I was managing owner.

Q. As managing owner, what were your orders with reference to the vessel?

A. I was making contracts in Los Angeles; I ran the work we did and all the work.

Q. What did you order about the vessel with reference to staying at Long Beach?

A. She was to stay at Long Beach tied up unless I came down and took her out.

Q. You ordered her there at Long Beach?

A. Yes, sir.

Q. Whom did you give that order to?

A. Pettenger.

Q. Did you ever countermand that? A. No, sir.

Q. Is that the same order that is contemplated by this writing Exhibit A? A. Yes, sir; it is.

Q. Did you ever change these agreements here?

A. No, sir.

Q. That he was to be bound by?

A. No, sir; there was no other agreement.

Q. Did you ever consent after December 23d, 1913, that Pettenger could make any contracts regarding the "Calypso"? A. No, sir.

Q. Or that he could make a contract?

A. No, sir.

Q. Or that he could get any credit on the "Calypso"? A. No, sir.

(Testimony of William L. Sassaman.)

Q. Or that he could employ a crew? A. No, sir.

Q. Or that he could transfer the ship's papers?

A. No, sir; [114] they should not be accepted from him.

Q. I believe you testified the time this agreement was signed you did not know the ship's papers had been transferred. A. I did not know.

Q. Yes. A. No, sir.

Q. Mr. Singleton has put up \$3,400, for the benefit of the boat? A. Yes, sir.

Q. What did he put it up with?

A. Paid notes; promissory notes that are paid.

Q. And those in turn to pay advances, supplies and repair claims against the boat?

A. Yes, sir; all claims against the boat.

Q. What were the claims generally?

A. Material.

Q. Repairs to the boat? A. Yes, sir, material.

Q. For part of the boat?

A. They went right into the boat; ship chandlery stores, material.

Q. Any of the money for anything else?

A. No, sir.

Cross-examination.

Mr. PRESTON.—Q. Mr. Sassaman, how old are you? A. 34.

Q. What is your business? A. Captain.

Q. What other business have you?

A. I have not any other business; I am working just now for a living.

Q. What work are you doing?

(Testimony of William L. Sassaman.)

A. Driving a milk wagon.

Q. How long have you been in that business?

A. I have been doing that on and off most of the time for six years.

Q. What were you doing in the month of December, 1913? A. Driving a milk wagon.

Q. What were you doing in November?

A. Driving a milk wagon.

Q. October? A. Driving a milk wagon.

Q. In January, 1914?

A. The same work. [115]

Q. How long have you been doing that same work?

A. Seven years.

Q. What do you say you are a captain for?

A. I do this work at night; part of the night only.

Q. What do you mean at night?

A. From two to six or seven.

Q. What? A. Taking milk.

Q. From two to six in the morning?

A. Yes, sir; four or five hours.

Q. What do you do then?

A. Go and take the boat out.

Q. This man Singleton, who is he, the man you are working for? A. No, sir.

Q. Is he connected with the business you are working for? A. I used to work for him.

Q. What is his business? A. Rancher.

Mr. PRESTON.—Who else do you represent, Mr. Lloyd.

Mr. LLOYD.—The creamery company he works for lending money on the mortgage.

(Testimony of William L. Sassaman.)

Mr. PRESTON.—Q. This \$3,400, is it on this boat?

A. The mortgage and Mr. Singleton's claim.

Q. \$3,400 of Singleton's, and how much is the mortgage?

A. I think there is a mortgage for \$425.

Q. How much, all told, over \$4,000?

A. Yes, sir.

Q. Is Pettenger equally liable with you on all this obligation? A. He is on that.

Q. He signed all the notes and mortgages?

A. He had to.

Q. He signed this agreement you made there with regard to Singleton? A. Yes, sir.

Q. And you are doing work for a creamery company now? A. I had been, yes.

Q. This indebtedness is represented by the joint obligation of you and Pettenger?

A. Yes, sir. [116]

Q. How much of it was the agreement between you that Pettenger should pay?

A. We would pay this money as we got it.

Q. Out of the earning of the boat?

A. Yes, sir; and I was paying whatever I could.

Q. What was the understanding; you claimed 5/6ths?

A. I handled the money and I paid off whatever money I got. I paid this off as I got the money in. Pettenger got no money except what he needed to live on.

Q. For running the boat? A. Engineer.

Q. As the proceeds would come in they were to go to discharge these obligations? A. Yes, sir.

(Testimony of William L. Sassaman.)

Q. When the obligations were paid, what would be the ownership; what proportion of ownership?

A. He would get his proportion.

Q. How much? A. Whatever we made.

Q. Suppose that indebtedness has been paid for by the earnings of the boat, what would have been the interest of Pettenger in the boat?

A. The same interest.

Q. Equal interest with you?

A. Not unless he paid the back money, that would equalize the partnership.

Q. You mean you got 5/6ths and he got 1/6th?

A. If he worked with me I would give him one-half.

Q. He was to have one-half after it was paid up?

A. Yes, sir.

Q. He was to give his time for his actual running expenses? A. Yes, sir.

Q. And after the thing was all paid up half the proceeds would be his and half would be yours?

A. Yes, sir.

Q. In the original investment, how much did you originally put in this boat yourself besides this indebtedness? A. About \$5,000.

Q. Besides this? A. Yes, sir. [117]

Q. How much did he put in?

A. I do not know the amount, he had about 1/6 of that, we figured it out.

Q. If you put in \$5,000, he has put in about \$1,000?

A. Not that much.

Q. If 5/6ths represents \$5,000, 6/6ths would

(Testimony of William L. Sassaman.)

represent \$6,000, and he would have in \$1,000 and you \$5,000?

A. It was figured out when the agreement was made.

Q. How much did he put in? A. About \$500.

Q. He still owns the interest?

A. He was supposed to relinquish it until Singleton was paid.

Q. This agreement represents the only thing in relation to it, does it not? A. Yes, sir.

Q. Mr. Singleton was to have security for the claim? A. Yes, sir.

Q. You do not mean to say he still has his 1/6th interest? A. No, sir.

Q. And you still own your 5/6ths?

A. That was the agreement as soon as the proceeds had been paid.

Q. Where did you get the idea in your mind that the part owner in the vessel had not a right to apply for a change of master?

A. Anybody might have a tenth or one-sixteenth, and they would not have anything to do with the running of it.

Q. I want to know what your idea is because you have five-sixths and he owns one-sixth, why he has not the right to say who the master shall be?

A. Because I am the managing owner.

Q. Did you ever see this paper here introduced in evidence as U. S. Exhibit 3? A. Yes, sir.

Q. Did you get it? A. Yes, sir.

Q. What did you do with it?

(Testimony of William L. Sassaman.)

A. I put it on the boat.

Q. Who is this man here, Oren H. Dickason?

A. He was once employed in my place. [118]

Q. Did you surrender the mastership to him?

A. Yes, sir.

Q. I believe you stated that you did surrender the mastership of this vessel on July 2d, 1913, to Oren H. Dickason.

A. Yes, sir.

Q. You knew, didn't you, that Mr. Dickason surrendered the mastership of the vessel to Ralph L. Lopes?

A. I was present when he surrendered it to Lopes.

Q. Were you also present when Lopes surrendered it to Castle?

A. Yes, sir.

Q. Who did you think was the master of the vessel when Pettenger took it out?

A. Castle was supposed to be the master.

Q. Where is Castle?

A. He is down in San Pedro.

Q. Was Castle in your employ?

A. Yes, sir; he was.

Q. When did he go out of your employ?

A. He never went really out of my employ, as far as the papers show.

Q. When did he go off your payroll?

A. I do not know the date.

Q. About when?

A. I cannot say.

Q. Was he on your payroll in October, 1913?

A. I do not know the date; I would have to look it up in my books.

Q. Do you know whether he was on your pay-

(Testimony of William L. Sassaman.)

roll in 1913 or 1914? A. 1913.

Q. Was it before or after Christmas?

A. Before.

Q. In the month of December, or before?

A. I cannot state the time; I cannot state the date;
I am sworn to tell the truth; I have no dates.

Q. Give us the month. A. I cannot.

Q. Give us your best impression as to when it was.

A. That would not be the whole truth; I cannot state it.

Q. We are not asking for the whole truth.

A. I am sworn to tell the whole truth, and nothing but the truth.

The COMMISSIONER.—Q. Come as near as you can to it.

A. What is the question? [119]

Mr. PRESTON.—Q. Give us your best recollection as to when this man Castle went out of your employ or the employ of the owner of the "Calypso"?

A. All I can explain to you gentlemen is, Castle was employed, but he did very little work.

The COMMISSIONER.—Q. Do you know when he went out of your employ?

A. He was paid for every trip he went out.

Mr. LLOYD.—Q. Paid by the trip?

A. Yes, sir.

Mr. PRESTON.—Q. When was the last trip?

A. I cannot state, unless I look it up in my book.

Q. Could it have been in the month of October?

A. It might have been.

Q. That was probably the last trip?

(Testimony of William L. Sassaman.)

A. That is close; it may have been in October, the last trip.

Q. Who did you think was the master of the vessel after he quit going out in her? A. After he quit?

Q. Yes.

A. He was still master; there was no transfer.

The COMMISSIONER.—That is your conclusion.

The WITNESS.—That is the record in the custom-house.

Mr. PRESTON.—Q. The man must have left your employ sometime or other? A. Yes, sir.

Q. Who became master after he left?

A. I was master when I took her out.

Q. Are you master? A. Yes, sir.

Q. You mean you could become master, or you are master? A. I am master.

Q. I thought you said a while ago that Castle was master?

A. I could take it from him at any time as managing owner.

Q. I thought you said that Castle was the master?

A. I was at any time I preferred to be.

Q. The upshot of it is you could become master, but you had surrendered it?

A. Castle had it; I acknowledged that before.
[120]

Q. The record does not show that you had ever been the master of the vessel.

A. In July. It was made out to me as managing owner.

Q. Since it was originally made out to you, you

(Testimony of William L. Sassaman.)

never had been the master of the vessel?

A. Yes, sir.

Q. You never had your papers changed to you?

A. No, sir.

Q. After Castle left your employ, how many trips did the vessel go out? A. She made no trips.

Q. Don't you know, as a matter of fact, she made trips with moving picture people?

A. I did not know that.

Q. I am asking you whether she made any trips or not? A. No, sir.

Q. When was she put in port with instructions not to move her?

A. She was in port with instructions not to use her without permission.

Q. Is it not a fact that on the 23d day of December you signed this agreement? A. Yes, sir.

Q. Could she have gone out before that without your instructions?

A. Only in the harbor; she could not make a trip.

Q. Did she make a trip?

A. No, sir; the creditors would not allow her.

Q. Did she? A. She did not.

Q. You know that of your own knowledge?

A. I do.

Q. She never made a trip from the time Castle went out until the 23d day of December?

A. Yes, sir.

Q. When was it you fired Fox, here?

A. That was on Sunday, in the harbor.

Q. When was it?

(Testimony of William L. Sassaman.)

A. I do not know the date; I can find it out when we go back.

Q. What was he doing on the boat?

A. He was on the boat because he told me Pettenger hired him.

Q. What was he doing?

A. He wanted to run her in the harbor.

Q. Did he?

A. He run her out a bit. [121]

Q. Is that the first time you had seen him?

A. I do not know whether I knew Mr. Fox or not before.

Q. How long had he been on the boat before you fired him?

A. I paid him a dollar and a half; about half a day.

Q. Where had the boat been the day before?

A. In the harbor.

Q. Where was it kept? A. Long Beach.

Q. In whose possession? A. My possession.

Q. Who was looking for her? A. I was.

Q. Where was Pettenger? A. At home.

Q. Was Pettenger down in the boat at any other time? A. He may have been.

Q. Did he take her out at any time?

A. No, sir.

Q. You know of your own knowledge where she was the whole time? A. Yes, sir.

Q. You know absolutely she never went out of the harbor at all until after the 23d day of December?

A. To the best of my knowledge, she never went out.

(Testimony of William L. Sassaman.)

Q. What is your impression?

A. Captain Connell has told me since that Petten-
ger had stolen her on other occasions.

Q. The boat was taken out at other times?

A. Yes, sir.

Q. Did he ever charge anything when he took the
boat out?

A. He told me that he had in the harbor.

Q. How far?

A. Simply in the harbor, within a mile or so.

Q. He got some pay?

A. He told me afterwards that he did and kept it.

Q. How much did you get? A. Nothing.

Q. How did you expect to pay the indebtedness of
this boat if you were not going to run her?

A. We were waiting for Catalina to open this
time.

Q. You were not going her until Catalina opened?

A. Just special parties. [122].

Q. In October or November, you would not run
her?

A. The creditors would not allow it; we were going
to run her in the harbor.

Q. How many trips for profit did she make be-
tween the time Castle went out and the 23d day of
December, when this agreement was made?

A. None to my knowledge.

Q. But you have heard of trips since then you did
not know of? A. Yes, sir.

Q. Before you had taken the vessel, yourself?

A. What time?

Q. Any time during that time? A. Yes, sir.

(Testimony of William L. Sassaman.)

Q. Where was this paper kept?

A. On the ship.

Q. Did you ever see that paper? A. No, sir.

Q. Why didn't you?

A. I had that paper put with my other papers on the ship; with the ship's papers, and these men, it seems, had taken it.

Q. Where? A. In the forecastle head.

Q. Under lock and key?

A. It was locked up.

Q. Who had the key? A. I had the key.

Q. Then you could get it?

A. I had the key that locks it up and I can produce the key.

Q. From October 23d, 1913, up until the time this boat was taken, you were down aboard the boat a number of times? A. Yes, sir.

Q. And you saw this paper lots of times?

A. I never looked at it; it was locked up.

Q. You say the paper was there at the time, but you did not see it?

A. I had no business to look at it; I was not going out.

Q. You tell me that in all the times you had the boat, that you had charge, you never saw this paper once?

A. I did; Mr. Mahar called for it when the boat was under my name.

Q. When was it?

A. Last spring, running to Catalina Island.

Q. You never knew it had been transferred?

A. No, sir. [123]

(Testimony of William L. Sassaman.)

Q. You never knew it, although it was in your private box? A. Yes, sir.

Q. How did Pettenger get into your box?

A. Pettenger had a key.

Q. And you had a key? A. Yes, sir.

Q. And you say you never saw it before?

A. Yes, sir.

Q. I will ask you if you did not have this proposition put on there for the very purpose of going down to bring in Chinese? A. It was not.

Q. I will ask you if it was not your purpose for making the same plea that you are making now?

A. It was not; I had that made to protect Mr. Singleton.

Q. I will ask you if this man Pettenger did not come to see you.

A. I beg your pardon, I am just as good a citizen as anyone.

Q. Didn't Pettenger come to see you?

A. Yes, sir.

Q. Didn't you know the hatch-way of the vessel was being cut out? A. No, sir.

Q. You heard about it? A. Yes, sir.

Q. How many times did you see the boat? How often have you seen the boat?

A. I went down there at different times.

Q. How often?

A. Once a week or twice a week.

Q. Once a month? A. No, sir.

Q. Didn't somebody keep her in shape while you were not there? A. It was not necessary.

Q. Was she locked up? A. Yes, sir.

(Testimony of William L. Sassaman.)

Q. Who had her locked? A. I.

Q. You had her locked?

A. Yes, sir, cabin doors, and boiler doors, and engine-room doors.

Q. What was there to prevent her going out, was she locked tight in any way?

A. Tight? I never heard of a boat being locked.

Q. Was there any reason why Pettenger could not take her out? [124]

A. Anyone could take her out and be charged with piracy.

Q. Did you light her up at night?

A. She was at the wharf, she needed no light.

Q. She had no light?

A. No, sir, she was tied to the wharf at Long Beach.

Q. You testified awhile ago you were taking brass polish down to Pettenger; what was Pettenger going to do if she had no light?

A. Pettenger wanted to clean her up; it was proper to do so.

Q. Where did Pettenger work during all of this time? A. I don't know.

Q. Where was the boat tied up?

A. In the harbor at Long Beach.

Q. How far was that from where you work?

A. At least twenty miles.

Q. You would have to take a car and ride to it?

A. 50 cents to the boat.

Q. Where was Pettenger working during the month of December? A. I don't know.

(Testimony of William L. Sassaman.)

Q. Don't you know where he was?

A. No, sir, he was at home.

Q. Where was his home? A. Long Beach.

Q. Didn't somebody sleep on this boat?

A. No, sir.

Q. Any bedding in this boat?

A. I had left a bed in it; it probably is there yet.

Q. Don't you know whether Pettenger slept there or not? A. I don't know.

Q. He might have slept there?

A. No, sir, I was down there at night to look after the boat; of course, there was a watchman there on the dock; I told him I was the owner of that boat that was tied up at Long Beach. He said no one slept on the boat. I says, "I am watching the boat." He says, "So am I, that is my business."

Q. Did you have any agreement with Pettenger prior to the time this agreement was made that he should not take the boat out? [125]

A. I was managing owner.

Q. I am asking you if it was understood between you that Pettenger should not take the boat out?

A. I entered no agreement; I was the owner of the boat.

Q. Answer the question.

A. Do you mean written agreement?

The COMMISSIONER.—Q. Answer the question, if you had any understanding about his taking out that boat.

A. Verbally, yes.

(Testimony of William L. Sassaman.)

Mr. PRESTON.—Q. What was the understanding?

A. I made contracts and was doing it.

Q. What was the understanding between you before this agreement?

A. That Morris Pettenger was my engineer.

Q. Your engineer? A. Yes, sir.

Q. And although he was an owner of the boat, he had no say in the management? A. He did not.

Q. You were the whole thing? A. I was.

Q. Why did you put it in writing?

A. Because Pettenger gave personal note that I had to pay.

Q. If you were manager and he was only working as engineer, why did you do it?

A. Pettenger was working, he and Fox were making money, and someone else took the boat out of the harbor and made money unknown to me.

Q. Who else took it out?

A. The fellow that got stuck out there.

Mr. LLOYD.—Q. The captain of some boat?

A. No, sir.

Mr. PRESTON.—Q. You cannot remember the name of the third party? A. No, sir.

Q. As I understand, you had this agreement made so that he could not carry the boat out without your knowledge; that is the reason you had the agreement made?

A. I said because he had given personal note.

Q. Didn't you say because he had taken the boat out with Fox and was making money?

(Testimony of William L. Sassaman.)

A. In the harbor of San Pedro. [126]

Q. He had taken it out?

A. Yes, sir. He took the boat out and he borrowed money on it.

Q. How could he borrow money on her with personal note?

A. He did it with anybody that would lend him money. The boat was bound for his personal notes.

Q. Did anybody ever attach this boat?

A. Yes, sir.

Q. Before? A. Yes, sir.

Q. If you had that suspicion of Pettenger and you and he did not get along well together, and you heard of his going out with the boat against your orders, didn't it occur to you to examine this to see whether he had the mastership of this vessel?

A. I did not think he would go that far.

Q. You did not think of that?

A. I never gave it a thought.

Q. You did not think he would go that far, having the mastership transferred? A. No, sir.

Q. How many times have you seen Pettenger since his arrest? A. I told you it was about a month.

Q. How many times?

A. I went down there, but did not see him, and left word for him to come and see me.

Q. Answer the question.

A. I am going to tell you; I will tell you the truth in the whole matter.

The COMMISSIONER.—Q. How many times did you see him? A. Three or four times.

(Testimony of William L. Sassaman.)

Mr. PRESTON.—Q. Where was the last time you saw him? A. At the attorney's.

Q. What attorneys?

A. Hammond, Riddle & Tuttle.

Q. Are these the men who are to be your attorneys in this matter? A. Yes, sir.

Q. You met him there at the attorney's office?

A. Yes, sir.

Q. How many times did you meet him there?

A. Twice at the attorney's. [127]

Q. You went over all the situation there at that time?

A. I did not go over any situation; the attorney would not handle the case, he was going to quit the law business.

Q. You went over to another attorney?

A. No, sir.

Q. Was Pettenger with you at the time you talked to your counsel?

A. No, sir I never had any counsel, until he was up.

Q. Had your counsel gone to see Pettenger, or Pettenger to see him? A. Not that I know of.

Q. Did Pettenger make any written statement at the time you had him at Tuttle's office?

A. I don't know.

Q. Did you go over it with him?

A. He talked to him.

Q. He spoke to you about coming there?

A. The attorney did.

(Testimony of William L. Sassaman.)

Q. You said awhile ago he had no right to manage that vessel.

A. He had the right to handle it as gasoline engineer.

Q. He was the gasoline engineer?

A. I can prove that Pettenger could not run a boat and cannot.

Q. Don't you know that he had for that length of boat? A. For engineer?

Q. Does that say engineer?

A. He had an engineer's license.

Q. Just look at the one you had.

A. I never compared it; that was his business.

Q. Is there any difference between the license you possess and the license Pettenger possessed?

A. I really never compared them.

Q. What do you mean by saying he had no right to operate? A. He has not.

Q. What is that?

A. I don't know that he had that license to operate any boat.

Q. Does this say engineer?

A. Morris Pettenger could not box a compass.

[128]

Q. It says, "To operate or navigate vessels not more than sixty-five feet in length propelled by machinery, and carrying passengers for hire, and vessels of fifteen gross tons or less, propelled in whole or in part by gas, gasoline, petroleum, naphtha, fluid, or electricity, and carrying passengers for hire."

(Testimony of William L. Sassaman.)

A. The law is very indefinite, if that gives a man the right to take out a boat.

Q. Have you the right?

A. I have one in my name.

Q. What have you? A. Ship's papers.

Q. Any different to these?

A. You have one there; I am master.

Q. You mean you were master?

A. I am still master.

Q. How do you get that?

A. As managing owner I can transfer it back any time.

Q. When this occurred and if you were having trouble with this man, why didn't you see you were made master of record?

A. At the time this happened, I was with Mr. Singleton; he and I were fixing up the notes of the creditors; I was busy, and never thought that Pettenger was getting a license. I can state to the Court—

Q. (Int.) You knew that from the time that Castle went out of your employ on or about November 24, 1913, up until the time that this boat was seized that it had no master. A. I was master.

Q. I mean had no master, as shown by the record.

A. Castle was still the master, as long as it was not transferred.

Q. You had a man not in your employ, you had nothing further to do with the further filing of the master of record? A. Castle was in my employ.

Q. You were mad at Pettenger because he was

(Testimony of William L. Sassaman.)

stealing the boat, and yet you stood by and let the master of the boat remain in somebody else's name?

A. It was not in his name. [129]

Q. You let it remain in somebody's else's name, notwithstanding the fact that the man whose name it was in was not on the boat, and you were having trouble with Pettenger, who was stealing the boat?

A. I had not heard of it at that time; it was later.

Q. Didn't you say awhile ago you made this contract because he was stealing the boat?

A. Yes, sir.

Q. On the 23d of December, you knew he was stealing the boat? A. Yes, sir.

Q. From the time the boat was seized until this time, you knew he was? A. Yes, sir.

Q. Why didn't you go down to the custom house and have it changed?

A. It never entered my mind that Pettenger had taken the authority to change the papers.

Q. Why didn't you have it changed after this change was made?

A. I testified it never entered my mind. As you gentlemen will understand, I went and saw Mr. Mahar, he is the head of the customs house, and he said "I will show you the record," and he showed me that Pettenger had transferred it. I went to Stoecklin and he said he would send a letter to this court just how this occurred.

Q. If you were having trouble with this boat, and you heard that Pettenger was taking it out, why, if you knew the master was not in your name, why

(Testimony of William L. Sassaman.)

didn't you have it changed?

A. If I knew that Pettenger was before the immigration inspector, I would put a piracy charge against him.

Mr. LLOYD.—Is this the letter you refer to as sent to the Court? A. Yes, sir.

Mr. LLOYD.—We offer that in evidence.

(The letter was marked Claimants' Exhibit "B").

[130]

(An adjournment was here taken until Thursday, April 16, 1914.)

On April 16th, on motion of Walter E. Hettman, Esqr., Asst. U. S. Atty., cause continued until April 24th, 1914, at 2 o'clock P. M.

On April 24th, on like motion cause continued until April 27th, 1914.

[Endorsed]: Filed Jun. 15, 1914. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [131]

*In the District Court of the United States, in and for
the Northern District of California, First Division.*

UNITED STATES OF AMERICA,

vs.

The Gasoline Launch "CALYPSO," Her Boats,
Tackle, Apparel, Furniture and Cargo.

**Testimony Taken Before United States
Commissioner.**

Monday, April 27, 1914.

Counsel Appearing:

WALTER E. HETTMAN, Esq., Assistant U. S. Attorney, for the United States.

Messrs. BLACK & CLARK, and LLOYD, CHENEY & GEIBEL, appear for the claimant and intervenor, Los Angeles Creamery Company.

Messrs. LLOYD, CHENEY & GEIBEL, appear for the claimants and intervenors, William L. Sassaman and William H. Singleton.

**[Testimony of Morris Pettenger, for the
Government.]**

MORRIS PETTENDER, called for the United States, sworn.

The COMMISSIONER.—Proceed with the examination.

Mr. HETTMAN.—Q. Mr. Pettenger, you are a one-sixth owner in the gasoline launch “Calypso”?

A. Yes, sir.

Q. You are in partnership with William L. Sassaman? A. Yes, sir.

Q. About what time, what date did you first enter into any agreement with him to acquire or buy a boat of any sort; as near as you can remember?

A. In the year 1912. [132]

Q. In the year 1912, was it? A. 1912, yes.

Q. Spring, or fall, or summer?

A. Spring, and we made our first payment and signed the contract with the launch construction

(Testimony of Morris Pettenger.)

company about the first of August, I believe, of that year.

Q. That was this boat, the "Calypso"?

A. Yes, sir.

Q. That you purchased then? A. Yes, sir.

Q. That was in August, 1912? A. Yes, sir.

Q. Who managed the boat, or run it during the rest of the year 1912?

A. The boat was under course of construction that year.

Q. About what time was it completed?

A. About the first of the year, 1912.

Q. And who was in charge of the boat most of the time when you took it out and run it? What was your capacity on board the ship? A. Engineer.

Q. You were the engineer? A. Yes, sir.

Q. Mr. Sassaman was aboard quite a bit of the time? A. Yes, sir.

Q. Did you take the boat out alone during the early part of 1913? A. Yes, sir.

Q. When was the first master's papers—when the first master's papers were taken out, were you present when the first master's certificate was made out?

A. No, sir.

Q. I will show you this certificate, which is entitled "Permanent Consolidated Enrollment and License for the Coasting Trade, No. 18 gasoline scow steamer called the 'Calypso,' and ask you if you can identify that, if you have seen that before.

A. Yes, sir.

Q. Where was that generally kept?

(Testimony of Morris Pettenger.)

A. Aboard the boat.

Q. And you saw it there among the papers?

A. Yes, sir.

Q. You had access to the papers there?

A. Yes, sir.

Q. This paper shows that on the 22d of May, 1913, Mr. Sassaman was sworn in as master of the ship. Did he serve as master of the ship [133] any-time after May, after he was sworn in as such master? A. Yes, sir.

Q. And you were on board the ship in what capacity? A. Engineer.

Q. Engineer? A. Yes, sir.

Q. There is another date of July 2d endorsed on the back, here.

A. He was master until July the 2d.

Q. Until July the 2d? A. Yes, sir.

Q. Then it shows that Oren H. Dickason was sworn in as master. Were you present when he was sworn in as master? A. Yes, sir.

Q. Were you present before the deputy collector of customs? A. Yes, sir.

Q. And you saw this man take the oath?

A. Yes, sir.

Q. Then there is the date of July 15th, in which Ralph L. Lopes was sworn in as master?

A. Yes, sir.

Q. Were you present at that time? A. Yes, sir.

Q. You went with him? A. Yes, sir.

Q. And you saw this paper stamped at that time?

A. Yes, sir.

(Testimony of Morris Pettenger.)

Q. Was Mr. Sassaman there? A. No, sir.

Q. Did Mr. Sassaman know that Mr. Lopes was master of the ship? Did he ever have any conversation? A. Yes, sir, he knew that he was.

Q. Did you ever have any conversation with him in regard to it? Did you have any talk with Mr. Sassaman in regard to Mr. Lopes being master?

A. I don't believe I did.

Q. There is another date, September 13, 1913, in which James K. Castle was sworn in as master. There is no other entry there until November 24th. Now, Mr. Castle acted as master for a period in September? A. Yes, sir.

Q. What did he do?

A. He was the master of the boat.

Q. And went out with you, when you went out on certain trips? A. Yes, sir. [134]

Q. In the latter part of September, was Mr. Castle there? A. No, sir.

Q. Where was he, to your knowledge?

A. Why, he left and went north, I don't know whether it was Montana or Idaho; one or the other of those states.

Q. You had Mr. Fox on board the ship, employed there in some capacity. Did you ever have any dispute with Mr. Sassaman about Mr. Fox, about his being employed there?

A. Not with me. Mr. Sassaman came down one time and fired him off the boat.

Q. About what month, or what time of the year was

(Testimony of Morris Pettenger.)

that? A. I could not say.

Q. But you remember that incident?

A. Yes, sir.

Q. The last endorsement on this change of master, on the back of this certificate, is November 24th, in which you are signed up as master; taking the place of Mr. Castle. When you were signed up as master, how long had Mr. Castle been gone?

A. Possibly a week, just a few days.

Q. When you went down there, you produced this, and did you call attention to the fact that you were one-sixth owner of the boat?

A. Mr. Stoecklin knew I was. I was acquainted with him, in a business way.

Q. Was there any hesitation on the part of Mr. Stoecklin?

A. No, sir, he asked me whether I had a right to do it, and I took the oath that is required by law.

Q. Did you have a talk with Mr. Sassaman at any time later, and inform him that you were signed up as master?

A. A few days later, yes; possibly about a week.

Q. About a week later? A. Yes, sir.

Q. You told him that you were signed then as master? A. Yes, sir.

Q. Did you have any conversation with Mr. Sassaman about a trip to Mexico, or about any project of going to Mexico? [135]

A. I did after Christmas.

Q. After Christmas? A. Yes, sir.

Q. Just what did you say to him, what was the

(Testimony of Morris Pettenger.)

nature of this conversation with Mr. Sassaman about going to Mexico?

A. It was on the 26th of December, I was in the city, and I saw Mr. Sassaman, and I told him that Fox had a proposition on for Mexico, and he wanted—we did not go into the details of it; he wanted to know if there was any money in it. I says “Yes.”

Q. You had already told him you had signed as master of the ship?

A. Yes, sir, he knew I was. There was not anything mentioned at that time whose name was on the ship’s papers.

Q. It had been a month before that you told him?

A. Yes, sir.

Q. In this conversation, did you tell him what Fox’s proposition was; did you go into the details?

A. No, sir; I told him there was a chance proposition, and ask him if he wanted to go down and talk to Fox about it. He says, “No, you go ahead,” he says, “and take the boat.”

Q. He was not on very good terms with Fox then, was he? A. No, sir.

Q. You had employed Fox again after Sassaman had discharged him once?

A. He was not employed, he was a partner.

Q. You had taken him in as a partner in this scheme to go to Mexico?

A. I guess he had taken me in, rather.

Q. What did you say to Mr. Sassaman about running down there? What you would do about sending

(Testimony of Morris Pettenger.)

the ship down there; was there anything further said?

A. He did not want to go. He proposed I should go. I says, "Are you willing to put your interest in the boat up against my liberty?" He says, "Yes." He says, "Go ahead and use the boat and get some money in."

The COMMISSIONER.—Q. What I understand you to say now with reference to that, you put up your liberty against his interest?

A. That is it. [136]

Q. Did he know, had you talked over what the object of this trip was?

A. I told him it was a chance proposition; I did not mention any Chinamen, or anything like that.

Q. He said, "Go ahead?"

A. Yes, sir, he said, "Go ahead and use the boat and get some money in."

Mr. HETTMAN.—Q. When you asked him to run the boat himself, he said, "No, you do it?"

A. Yes, sir.

Q. Is that it? A. Yes, sir.

Q. In the matter of profits, you had had some understanding late in the year 1913 along in November or some time about dividing the profits?

A. Yes, sir.

Q. Just what was that agreement?

A. I was to share half of the profits.

Mr. LLOYD.—Q. That agreement was in writing?

A. Yes, sir.

(Testimony of Morris Pettenger.)

Mr. LLOYD.—Then, we object to this as not the best evidence.

Mr. HETTMAN.—Q. There was some agreement?

A. Yes, sir.

The COMMISSIONER.—Show him the agreement, and ask him if he entered into the agreement.

Mr. HETTMAN.—Yes. Where is that agreement?

The COMMISSIONER.—It is here in evidence.

The WITNESS.—That is the agreement, there (pointing).

The COMMISSIONER.—Q. You entered into that understanding, did you? A. Yes, sir.

Mr. HETTMAN.—Q. What date did you sign this? A. Which?

Q. That subsequent attachment there?

A. The 26th of December.

Q. What, 1914? A. 1913.

The COMMISSIONER.—Q. This refers to "Claimant's Exhibit A." This amendment to the articles of agreement purports to have been entered into on the 23d day of December, 1913.

Mr. HETTMAN.—May I ask him some questions in regard to that? [137]

The COMMISSIONER.—Q. This agreement, here, you understand has this clause: (Reading) "Under no circumstances shall the ship's papers be transferred to anyone except by William L. Sassaman." You understand that part, it contains that clause? A. Yes, sir.

(Testimony of Morris Pettenger.)

Mr. HETTMAN.—Q. When you signed this, you had already notified him of that fact?

A. No, sir, that was later.

Q. It was later you informed him you had the papers in your name?

A. No, sir, he had been informed that the papers were in my name before that.

Q. Before you made this contract?

A. Possibly two or three weeks before this.

The COMMISSIONER.—Q. Two or three weeks before you entered into the amended agreement?

A. Yes, sir.

Mr. HETTMAN.—Q. You had already notified him that you had the papers in your name?

A. Yes, sir.

Q. And there is the final clause here: (Reading) "It is also agreed that I, Morris Pettenger, shall not employ a crew without a permit from William L. Sassaman, and under no circumstances shall the ship's papers be transferred to anyone except by William L. Sassaman." You made this trip to Mexico, and informed him you were going, and had his consent, did you not?

A. After the signing of that.

Q. All that came subsequent to the signing of this agreement? A. Yes, sir.

Q. Which was made on the 21st day of December, 1913? A. Yes, sir.

Q. You told him you were going to Mexico, and he said, "Go ahead"? A. Yes, sir.

(Testimony of Morris Pettenger.)

Q. You considered your subsequent agreement in compliance with this?

A. That never entered into it, only to get his consent.

Q. And you had gotten his consent, as you considered it? A. Yes, his verbal consent. [138]

The COMMISSIONER.—Let him state what actually happened. Whatever he might take from it would be a conclusion. We want to know what he said, and what Mr. Sassaman said.

Mr. HETTMAN.—We have already gone into that fully, what took place in the conversation had.

Q. In this contract which says: "This amendment made this 23d day of December, 1913," and which ends as follows: "Under no circumstances shall the ship's papers be transferred to anyone except by William L. Sassaman," he knew already that the papers were in your name, and if they were to be transferred to anyone else, they were to be transferred to no one but Mr. Sassaman?

A. Yes, sir, to him.

Mr. HETTMAN.—That is all.

Cross-examination.

Mr. LLOYD.—Q. Now, Mr. Pettenger, in these questions we want nothing but the absolute truth, land where it will.

A. That is what I am going to try to give you.

Q. Affecting you or affecting the vessel. You know that when you went and had yourself entered on the ship's papers as master, that Sassaman did not know about it, don't you? A. Sassaman?

(Testimony of Morris Pettenger.)

Q. Sassaman.

A. He did not know at the time.

Q. He did not know that at the time?

A. Yes, sir; but you understand I was the manager; I believed I was acting within the law, and had the right to transfer those papers, as I was a part owner of the boat.

Q. At that time you owned one-sixth?

A. Yes, sir.

Q. The only writing between you was this "Claimant's Exhibit A," at that time, dated August 10, 1912? A. That was the only writing.

Q. That is your signature, Morris Pettenger, is it not? A. Yes, sir. [139]

Q. And then, on November 24th, 1913, when you had yourself named in the ship's paper as master, this writing had not been changed? A. No, sir.

Q. And you were one-sixth owner at that time?

A. Yes, sir.

Q. And Sassaman owned $\frac{5}{6}$ ths? A. Yes, sir.

Q. And there had been nothing said about having you enrolled as master at that time? A. No, sir.

Q. At that time, were not the ship's papers in a box, locked up and marked "Don't handle" in the forecastle, in the boat?

A. They were in a box, but not locked.

Q. Was not the forecastle locked up?

A. Part of the time.

Q. It was locked up by Sassaman; you had a key to it, didn't you? A. Yes, sir.

Q. It was locked up by Sassaman, and the ship's

(Testimony of Morris Pettenger.)

papers were in there. Is not that true?

A. Yes, sir.

Q. Just answer "Yes" or "No." I don't want to lead you into an untruth, here, of any kind. We just want the facts.

Mr. HETTMAN.—There is no use giving any admonition; he is here to tell the truth.

The COMMISSIONER.—Just ask him the questions.

Mr. LLOYD.—Q. The ship's papers were in a box there, marked "Don't handle"? A. Yes, sir.

Q. And you took them out without the knowledge of Sassaman? A. Yes, sir.

Q. Had there not been more or less soreness or coldness between you and Sassaman since August, when the boat had been libeled?

Mr. HETTMAN.—I don't see when the boat was libeled in August.

Mr. LLOYD.—It is a matter that will come out.

A. Yes, sir.

Q. He did not like it, that it had gotten in a position under [140] you where it was libeled, is not that true, and there was a great deal of feeling about it. Answer me "Yes" or "No."

A. Well, he did not like it.

Q. Is it not true that one day after Lopes was enrolled as master that you took this license of Sassaman, United States Exhibit 1, out of the pilot house and took it below? A. Yes, sir.

Q. And didn't Sassaman make you take it back and hang it up there?

(Testimony of Morris Pettenger.)

A. No, sir, he did not make me do it, he requested me to do it.

Q. And wouldn't there have been a fight right there if you did not? A. I do not think so.

Q. There were words about it, and you put it back?

A. If you want to know my reason about it, I will tell you. The law only allows one—

Q. (Intg.) Just answer the question.

Mr. HETTMAN.—Let him finish his answer.

The COMMISSIONER.—Yes, let him state the circumstances.

A. (Continuing.) The law only allows one master's license in the pilot house at the same time. Supposing that custom-house men—

Mr. LLOYD.—(Intg.) Just answer the question.

The COMMISSIONER.—Let him state the circumstances under which he returned it.

A. I took his license down, it was in case a custom-house man would come aboard the boat and see two master's licenses in the pilot house, they might get confused, they might not know who it was that was master, unless they asked.

Q. Sassaman knew at that time that Lopes was master? A. Yes, sir. [141]

Mr. LLOYD.—Q. He said that he was 5/6ths the owner and wanted that put there and you put it back?

A. He requested me to put it back there; I did not know at the time I took it down that it was going to hurt his feelings; he thought possibly I did it for spite work, I guess.

Q. It was put back there until the boat was seized?

(Testimony of Morris Pettenger.)

A. I believe it was. I also put my license up there in the pilot house.

The COMMISSIONER.—Q. How long was your license there? A. The 24th of November.

Q. Did Mr. Sassaman at any time see it there, to your knowledge?

A. I could not say whether he did or not.

Mr. HETTMAN.—He was on the boat after the 24th of November and in the pilot house, was he not?

A. Yes, sir.

Q. And this was hanging on the wall?

A. Yes, sir.

Q. In that frame, with all the fastenings that held it in the wall? A. Yes, sir.

Mr. LLOYD.—Q. You only got this for the “Calypso.”

Mr. HETTMAN.—I am asking you about your license.

A. Whether it was in the pilot house, or engine room, that is what you wanted to bring out?

Mr. HETTMAN.—Q. Yes, where was your license hanging? A. It was in the pilot house.

Mr. LLOYD.—Q. It had been there all the time.

A. Before that, it had been in the engine room. I had engine papers under that. I have also engineer's papers under this license.

Q. Where was this license put when you first got it? A. In the engine room.

Q. When did you move it to the other place?

A. A short time after I had the papers transferred.

(Testimony of Morris Pettenger.)

Q. That is, a short time after November?

A. Yes, sir.

Q. You had the papers transferred on November 24th, 1913? A. Yes, sir.

Q. And you moved it into the pilot house a short time after that? A. Yes, sir.

Q. You do not know positively that Sassaman ever saw it in the pilot house? A. No, sir, I do not.

Q. You have a signed copy of this agreement, have you not? A. Yes, sir.

Q. And this is your signature, I believe you said, on the amendment dated December 23, 1913?

A. It is.

Q. This means just what it says, does it not?

A. Yes, sir.

Q. At the time it was signed, you both intended to sign these agreements, didn't you?

A. Yes, sir; he gave it to me to sign. He was the one that proposed it.

Q. Why did he propose it?

A. I don't know, unless it was to take the management of the boat out of my hands.

Q. But you signed it, and took a copy of it yourself, did you not? A. Yes, sir.

Q. Has there been any writing or amendment to this since? A. No, sir.

Q. You are referring to the papers, "Claimant's Exhibit A," and the amendment to it?

A. Yes, sir.

Q. You know that Castle worked by the job while he was master? A. By the day, yes.

(Testimony of Morris Pettenger.)

Q. He did not have any monthly employment, did he? A. No, sir.

Q. You remember after the boat was seized, and after you came back to Los Angeles, that Sassaman sent word that he wanted to see you, don't you, and left word at your home?

Mr. HETTMAN.—What date was that? [143]

Mr. LLOYD.—It would be after the boat was seized here, and after he first reached Los Angeles.

A. Yes, sir, he was down at Long Beach, and left word.

Q. And that was some little time before you got to see him? A. Probably two or three days.

Q. He came to see you, didn't he? A. Yes, sir.

Q. And when he first saw you, didn't he ask you why you had not come to see him?

A. Not that I remember of.

Q. Didn't he tell you that he had been trying to see you, and was waiting to see you?

A. Possibly he did.

Q. Now, if he was in this venture with you, or had told you to go ahead and make it, why didn't you go right to him and tell him what happened?

A. Because I had been shadowed all the time.

Q. You had been arrested, had you not?

A. Yes, sir.

Q. You had been released had you not?

A. Yes, sir, but that was no sign the detectives were not on the job.

Q. You had *seen before* a good many times, why could you not see him afterwards?

(Testimony of Morris Pettenger.)

Mr. HETTMAN.—You were doing this to protect Mr. Sassaman, were you not?

Mr. LLOYD.—Let me finish my examination.

The COMMISSIONER.—Yes, let him finish cross-examining.

Mr. LLOYD.—Q. Why didn't you go to see him and tell him about it?

A. I told you because I was being shadowed.

Q. Because you were being shadowed?

A. Yes, sir.

Q. Is it not a fact that you told him when he came there—that he upbraided you for not seeing him, and for taking the chances, and you said, "I wanted to take this chance for the Foxes, so that we could pay this money to Singleton?"

A. No, sir.

Q. You did not say that to him?

A. No, sir. [144]

Q. Didn't you say something like that?

A. Not that I remember of.

Q. You don't remember? A. No, sir.

Q. Is it not the fact that the Foxes got you into this deal?

A. Well, possibly; after that, they made the proposition to me that I should go; somebody else might have made me the same proposition and I might have gone.

Q. And is it not a fact that after Singleton fired Fox off of the boat that he never consented to his running on that boat again?

A. Yes, sir, that is true.

Q. Is it not also true—do you remember when he

(Testimony of Morris Pettenger.)

used to run out to the Chinese junks on the bay?

A. Yes, sir.

Q. That was before you were enrolled on the ship's papers, was it not? A. Yes, sir.

Q. Don't you remember one time when you were running out to the Chinese junk that you said something like this to Fox—I will ask you first, was not the boat in trouble at that time? A. Yes, sir.

Q. And didn't you need the money for the boat?

A. Yes, sir.

Q. And at that time Singleton had not come to your aid yet? A. No, sir.

Q. And had you not been talking to the Foxes, and didn't you make some sort of statement like this to Sassaman: "We will get all the fucking coming to us"? A. No, sir.

Q. You never made such a statement?

A. No, sir.

Q. Didn't he say, "We will not"? Or, don't you remember that incident? A. I don't remember.

Q. You don't remember that incident?

A. No, sir.

Mr. HETTMAN.—What is the relevancy of that?

Mr. LLOYD.—That had a special meaning. We claim that is the only word that was ever said to Sassaman about this venture [145] and that that was his answer.

Q. Didn't you say to Sassaman, when he went to your house, that you did not tell him of the trip when he asked you why you did not tell him about the trip, as you said you did not tell him, because

(Testimony of Morris Pettenger.)

Sassaman would not let you go? A. No, sir.

Mr. HETTMAN.—I don't understand that question.

Mr. LLOYD.—He says "No."

The COMMISSIONER.—Q. You understand the question, Mr. Pettenger, that was asked you?

A. Yes, sir.

Mr. HETTMAN,—Very well.

Mr. LLOYD.—Q. When you signed this amendment to this agreement on December 26, 1913, dated December 23d, why did you sign it, if you were intending to go off on a trip?

A. I did not intend to at that time.

Q. When did this intention first come up?

A. The proposition had been sprung on me, but I had not consented to go, or anything of the kind.

Q. So you signed this before you consented to go?

A. Yes, sir, before I ever said anything to Sassaman about it.

Mr. LLOYD.—Will it be stipulated that the depositions of A. J. Stoecklin, Morris Pettenger, Louise E. Grimaud, George E. Platt and William L. Sassaman, filed April 15, 1914, and taken April 9th, 1914, before C. K. Schade, a notary public at Los Angeles, California, be opened.

Mr. HETTMAN.—Yes.

Mr. LLOYD.—Q. Referring to page 9 of said deposition, that is your signature to the deposition, is it not? A. Yes, sir.

Q. And before signing that you had testified and read the deposition over?

(Testimony of Morris Pettenger.)

A. Yes, sir, I had read it over hurriedly, because I was anxious to catch the train and come up here.

Q. But you had testified at the meeting?

A. Yes, sir. [146]

Q. And had read this over and signed it?

A. Yes, sir.

Q. On page 7 of the said deposition is the question: "At the time said amendment was signed, December 26, 1913, was William L. Sassaman with you?"

A. Yes, sir.

Q. Did he sign the same? A. Yes, sir.

Q. After signing the same, and before said 'Calypso' was seized, did you see Mr. Sassaman?

A. No, sir."

A. After the 26th of December?

Q. Yes, you did not see him?

A. Not after the 26th of December.

Q. Then, when did you make the arrangements as you say, for taking this boat on this trip?

A. That very same day.

Q. That very same day? A. Yes, sir.

Q. At the time of signing this?

A. No, sir, it was afterwards.

Q. How long afterwards?

A. Oh, possibly an hour or so.

Q. Where? A. It was in the barnyard.

Q. In the barnyard of the creamery company?

A. The Los Angeles Creamery Company.

Q. Was not that all you said at that time? You did not mention any Chinamen, did you?

A. I don't believe I did.

(Testimony of Morris Pettenger.)

Q. You testified a while ago that you did not. Didn't you merely tell him it was a chance proposition?

A. I believe that is about what I told him, it was a chance proposition.

Q. And you did not explain the details?

A. No, sir.

Q. You are quite sure you did not explain the details. A. I am quite sure I did not.

Q. Did you tell him the Foxes were going?

A. I don't believe I did.

Q. Did you tell him that Main was going?

A. No, sir.

Q. Did you tell him about Lee? A. No, sir.

Q. When did you first tell him you were Master, after you had got [147] the papers transferred to you?

A. I could not say the exact date; it was the early part of December.

Q. What did you say? Where did you meet him?

A. I don't know; possibly in the barnyard. That is where I generally met him.

Q. What did you say?

A. He mentioned something about whose name was on the papers and I told him mine.

Q. Was that not long after the boat was seized?

A. No, sir.

Q. How did this question come up?

A. Well, I had suggested, and he had heard that Castle was gone and he probably asked me the ques-

(Testimony of Morris Pettenger.)

tion to find out. Sassaman never did much work about the boat.

Q. You never went as a seafaring man before you were engaged on the "Calypso"?

A. Not in that position.

Q. You never had any experience in navigating ships as a navigator? A. No, sir.

Mr. HETTMAN.—What is the materiality of that?

Mr. LLOYD.—He had no seaman's qualifications.

Mr. HETTMAN.—You are not qualifying him as an expert, are you?

Mr. LLOYD.—Q. You served as an Engineer under Sassaman? A. Yes, sir.

Q. And Sassaman never said anything about your becoming Master? A. No, sir.

Q. He never asked you to become Master?

A. No, sir.

Q. You never went to him and asked him to become Master? A. No, sir.

Q. As a partner he owned five-sixths; why didn't you ask him before you had the papers transferred? [148] A. He was doing very little.

Q. Was not he working all the time.

A. I didn't see any money in it.

Q. Don't you know he was working all the time?

A. He was not working for me.

Q. Didn't you make some money from the boat and pocket it? A. Very little.

Q. You did take some and pocket it?

A. I might have used some of it.

(Testimony of Morris Pettenger.)

Q. Didn't he settle a note that you had given on the boat out of his own pocket?

A. Not that I know of.

Q. Didn't you give a note on the boat?

Mr. HETTMAN.—I object to that as being immaterial. The fact is they were partners, and that is enough. We don't have to go into that point.

The COMMISSIONER.—If that is a fact, he gave a note—was this note against the boat?

Mr. LLOYD.—Q. Didn't you give a two-hundred dollar note against the boat, or as a debt of the boat that he later on had taken care of?

A. No, sir, I gave no note without his consent.

The COMMISSIONER.—When you say a note against the boat, that is hardly intelligible.

Mr. LLOYD.—Q. Didn't you give a note to the Hatfield Machine Company for \$200?

A. Yes, sir; that was to purchase life-rafts.

The COMMISSIONER.—Q. For the boat?

A. Yes, sir.

Mr. LLOYD.—Q. And you gave your personal note? A. I don't think I gave any note at all.

Q. You just ordered the life-rafts?

A. I went down and told him I wanted three life-rafts. I did not have the money to get them out of the transfer company's house; they were sent down there with a bill of lading attached; Hatfield gave me \$200 I don't remember [149] any note having been given.

Q. He gave you \$200?

A. He gave me \$200 cash to get those life-rafts.

(Testimony of Morris Pettenger.)

Q. But that indebtedness you incurred for the life-rafts? A. Yes, sir.

Q. Is not that one reason why this paper was signed that Sassaman brought you?

A. I could not tell you.

Redirect Examination.

Mr. HETTMAN.—Q. When you took Dickason over there, and went in there with the certificate of Master of the boat, and he had signed up as Master in place of Mr. Sassaman, Sassaman knew about it, he knew that Dickason was serving as Master after that? A. Yes, sir.

Q. And later you transferred the mastership from Dickason to Lopes, he knew that Lopes was serving as Master? A. Yes, sir.

Q. And later when you transferred it to Castle he knew that Castle was serving as Master?

A. Yes, sir.

Q. You had a talk with him, and he knew you were paying Castle so much a day for working on the ship, and he knew Castle was Master? A. Yes, sir.

Q. When Mr. Castle went to Montana was there any conversation about his going away; did you have any conversation with Mr. Sassaman about it?

A. No, sir.

Q. How long had Castle been gone to Montana before you transferred the papers to your name?

A. Possibly a week.

Q. That was, on November 24th, as set forth here, you became Master? A. Yes, sir.

Q. And about the 1st of December you yourself

(Testimony of Morris Pettenger.)

went to Mr. Sassaman and told him about it?

A. Yes, sir.

Q. Did you tell him that Mr. Castle was gone?

Mr. LLOYD.—Please don't make your questions so leading.

A. Yes, sir. [150]

Mr. HETTMAN.—Q. What conversation did you have with him then?

A. It is so long ago I hardly remember, but Sassaman asked me whose name was on the papers at that time, and I told him that I had my own.

Q. Did he tell you to transfer the papers back to him; did he say anything about transferring the papers; did he object to it in any way?

A. I believe he did mention something, but not at that time; later on.

Q. But he never transferred them?

A. No, sir, he never transferred them.

Q. At that time he agreed or acquiesced to your being Master, nothing further was said about it at that time?

The COMMISSIONER.—Let him say what was said.

Mr. HETTMAN.—Very well.

Q. If you can give me the exact words, do so.

The COMMISSIONER.—Q. What did he say to you when you told him that you had yourself enrolled as Master of this vessel?

A. He did not say anything that I remember of. He did not object to it.

Mr. HETTMAN.—Q. Did he show any disap-

(Testimony of Morris Pettenger.)

proval of it in any way? A. No, sir.

Q. He did not say anything at all? A. No, sir.

Q. When you got this paper, this certificate out of the box, you had a key to that box on board the ship?

The COMMISSIONER.—He said the box was not locked.

Mr. HETTMAN.—Q. You had access to it, as well as anybody else on the ship?

A. Anybody working on the boat.

Q. And you put Sassaman's license away and put your own up there?

A. His license still remained with mine.

Q. You had them both in the cabin?

A. It was that other man he objected to his license in the pilot-house. [151]

Q. You had your license up there on and after the 24th of November?

A. Not on that particular day, but later.

Q. After you had transferred the Mastership to yourself? A. Yes, sir.

Q. And that was put there in plain view on the wall? A. Yes, sir.

Q. Hanging right opposite Mr. Sassaman's in the cabin? A. Yes, sir.

Q. This contract here, you signed this supplement on the 26th day of December? A. Yes, sir.

Q. And this contract reads as follows:

“Amendment to Articles of Agreement made August 10, 1912, for the ‘Calypso,’ between Wm. L. Sas-

(Testimony of Morris Pettenger.)

saman and Morris Pettenger, both of Los Angeles, California.

“This amendment made this twenty-third day of December, 1913, in consideration that Wm. H. Singleton agrees to pay promissory notes to the amount of \$3400.00, which amount clears the indebtedness of the ‘Calypso,’ I, Wm. L. Sassaman, and I, Morris Pettenger agrees to give said Wm. H. Singleton a mortgage on the ‘Calypso’ for the amount of \$3,400.00, with interest at 8%, and deliver to Wm. H. Singleton the insurance policy which amounts to \$5000.00, and further, that I, Morris Pettenger, agrees to make no contracts or take the ‘Calypso’ out on any trip without a permit from Wm. L. Sassaman, also that I, Morris Pettenger agrees to borrow no money or give any personal note at any time on the ‘Calypso.’ It is also agreed that I, Morris Pettenger, shall not employ a crew without a permit from Wm. L. Sassaman, and under no circumstances shall the ship’s papers be transferred to anyone except by Wm. L. Sassaman.”

And one hour after signing, according to your statement just a few moments ago you told him of a project of going to Mexico, did you not?

A. Yes, sir. [152]

The COMMISSIONER.—There is no use reiterating that. He has said that; it appears of record. That is merely giving your version of it.

Mr. HETTMAN.—I want to be positive.

The COMMISSIONER.—Let him testify.

Mr. HETTMAN.—Q. That conversation that you

(Testimony of Morris Pettenger.)

had with him one hour after signing, was that the conversation in which you said "we are likely to have something done to us" in which he asked you whether or not you used this vile word?

A. No, sir, that was previous to this.

Q. That conversation had nothing to do with this on the 26th day of December? A. No, sir.

Q. And what were the exact words you said to him about this project to Mexico; what did you tell him?

A. I told him that I had a proposition made me to go to Mexico, a chance proposition, and if he wanted to go ahead and take the boat, he could go down and talk to those people, and he says "no," he says "you go ahead and make the trip"; and I says "Then you are willing to put the boat up against my liberty, are you" and he says "Yes," he says "Go ahead and use the boat and get some money in." Our conversation was very brief.

Q. After your arrest you said that you did not go immediately to see Mr. Sassaman because you were being shadowed? A. Yes, sir.

Q. At least you thought you were being shadowed?

A. I knew that I was.

Q. What was your reason for not going directly to see him if you were being shadowed; what material difference would that make?

A. Well, I did not know but they might want to get him mixed up in it; he had taken no active part in it.

Q. So you were doing that to simply save him from any trouble if you could? A. Yes, sir. [153]

(Testimony of Morris Pettenger.)

Mr. HETTMAN.—That is all.

The COMMISSIONER.—Are there any further questions?

Recross-examination.

Mr. LLOYD.—Q. You were down at San Diego when the creditors' meeting was held?

A. Yes, sir.

Q. You had gone down and made a preliminary trip to this Chinese trip, had you not?

A. Yes, sir.

Q. Then, why did you sign this paper afterwards that you would not take the boat?

A. Because I was the manager of this boat until after I signed that, and when I signed that I was no longer the manager; then I got his permission.

Q. Don't you know that while you were down there at San Diego on that trip he knew nothing about it?

A. That is true.

Q. He did not know a thing about it?

A. That is true. I had taken the boat out on a number of occasions that he knew nothing about.

Q. Don't you know you had taken the boat out a number of times and he knew nothing about it?

A. Yes, sir.

Q. Don't you know while you were down there at San Diego he held the creditors' meeting and then he took a 75-mile trip out in the rain to Singletons to get those notes signed up, and came back about 2 or 3 o'clock at night and went on his route, and then went down to Hatfields, I think Hatfield's Machinery Company, before he had a bite of breakfast, trying

(Testimony of Morris Pettenger.)

to fix up the matter with the creditors?

A. Yes, sir.

Q. Don't you know that all happened while you were off on the boat without his knowledge?

A. Yes, sir.

Q. Don't you know that up to the time this paper was signed he knew nothing absolutely about any illegal intention to use the boat?

A. I was the manager of the boat; I had the right to run the boat; [154] I was the Captain.

Q. Don't you know that up to the time this paper here was signed that Sassaman didn't know anything about the Mexican trip, or about talking with Fox?

A. He knew nothing about that until possibly the 26th day of December.

Q. So the only thing he could have known about it was what you said to him on that day?

A. That is all.

Mr. LLOYD.—That is all.

The COMMISSIONER.—Q. Along the water front were you ever approached before to do a thing of this sort?

A. Not seriously that I remember of.

Q. Were there men going about there trying to get boats to engage in this sort of traffic?

A. That stuff is frequent around the water front. Lots of times they are just joshing and lots of times they are serious.

Q. So to speak, then, it was in the air there. There was a certain feeling that those things were being done; is that true?

A. Some of them were doing it all the time.

[Testimony of William L. Sassaman for Claimant.]

WILLIAM L. SASSAMAN, called for the Claimant, sworn.

Mr. LLOYD.—Q. You heard Mr. Pettenger testify that up to the time this amendment dated December 23, 1913, was signed, it being signed on December 26th, 1913, that you knew nothing about any plans for any illegal use of the “Calypso” with reference to Chinese or otherwise; is that true? A. Yes, sir.

Q. And also that you knew nothing about the first trip to San Diego to try to make those arrangements?

A. Yes, sir.

Q. You also heard him testify that about an hour after this was signed, that he told you about wanting to make a trip? [155] A. I heard him say so.

Q. Is that true? A. Is what true?

Q. His statement. Answer fully what was said.

Mr. HETTMAN.—Answer his question directly.

Mr. LLOYD.—It might not be capable of yes or no.

The COMMISSIONER.—Q. Let the question be answered. Answer the question.

A. No, sir, I did not give any consent.

Q. Tell us fully what happened after the signing of this; did you have a talk with Morris Pettenger after this was signed? A. On the 26th?

Q. Yes. A. No, sir. I went with Mr. Hatfield, he would not let me go until I finished it up. I went and done all this. I had been up from 2 o'clock in the morning, I had fixed up that business I worked all day, from that time right on through the day to get that finished, and took an automobile to Singleton's

(Testimony of William L. Sassaman.)

place, 75 miles and back, I got back at 10 minutes to 3.

Q. Who is Hatfield?

A. Hatfield Machinery Company, Frank A. Hatfield, Manager.

Q. The Corliss Engine? A. Yes, sir.

Q. How much did you owe them?

A. The whole amount.

Q. Yes?

A. \$1300, I believe. After I came back from that trip I went out on my route; I served a route, and I came back probably about 9 o'clock on Christmas morning. Hatfield was waiting for me, he even went up there, to do this work. Hatfield demanded I go back to the Hatfield Machinery Company's office; I gave him my note and finished that business with him and signed and endorsed a note of Mr. Pettenger's myself. Then I say I went to bed, which I did. I had no business with anybody that day; I did not get up until 2 o'clock. If any man thinks I did not go to bed after such an ordeal as that— [156]

Q. (Intg.) We are talking about the 26th day of December. A. Yes, sir.

Q. Did you sign this agreement on the 26th?

A. Yes, sir, I was all in.

Q. You say you had no such conversation as he relates here an hour after that was signed?

A. No, sir.

Q. With reference to taking the boat?

A. No, sir, I left Hatfield Machinery Company's office and went to bed.

(Testimony of William L. Sassaman.)

Q. Let us get that a little clearer. Tell us how Hatfield came to you, and then when you first saw Pettenger, and all about the signing of the paper, and your going to bed. Tell what happened from the 23d, the day of the meeting with the creditors until—

Mr. HETTMAN.—(Intg.) I object to his going into those details, of taking his trip, and when he went to sleep; that is immaterial; he has already stated that. A. I had no conversation.

The COMMISSIONER.—Q. Was Pettenger there? A. Yes, sir, he came up.

Q. He signed this agreement?

A. Yes, sir, and he told me he had been to San Diego. I think if Mr. Pettenger remembers right, he will tell you.

Q. You had no talk with him after he signed it?

A. No, sir.

Q. Where did Pettenger go after signing that agreement? A. I don't know where he went.

Q. Did he leave at once? A. Yes, sir.

Q. Right away? A. Yes, sir.

Mr. LOYD.—Q. Where were you when this paper was signed with Pettenger?

A. In Bradner's office, in the Security Building.

Q. What time of day was that?

A. After twelve; after dinner.

Q. Then what did you do?

A. I went to bed. [157]

Q. What day was it that you went out in the automobile to Singleton's?

A. That was on the morning of the 24th.

(Testimony of William L. Sassaman.)

Q. The morning of the 24th? A. Yes, sir.

Q. And you got back about three o'clock?

A. Ten minutes to three, was the exact time I got back on Christmas morning.

Q. Then when did you get through your route on Christmas morning?

A. About nine o'clock, to my memory now.

Q. Then what did you do?

A. I went with Hatfield to Bradner's office.

Q. That was on the morning of the 25th?

A. Yes, sir.

Q. Then what time did you get done at Bradner's office? A. That only took about five minutes.

Mr. HETTMAN.—What is the purpose of this?

Mr. LLOYD.—To show where he was, who was with him.

The WITNESS.—I signed the paper and went to Hatfield Machinery Company's office.

Q. You mean that Pettenger signed this paper on the 25th? A. No, sir, on the 26th.

Q. This is the 25th, we are talking about?

A. I went to Hatfield Machinery Company's office and settled that business.

Q. Was Pettenger with you then? A. No, sir.

Q. Then, after you got through, what did you do?

A. I went to bed.

Q. How late did you sleep?

A. Until two o'clock the next day.

Q. Then you slept from the morning of Christmas day until two o'clock in the morning of the 26th?

A. Yes, sir.

(Testimony of William L. Sassaman.)

Q. Did you take your route out that morning?

A. Yes, sir.

Q. What did you—what time did you get through with your route?

A. I came back the same time, between eight and nine.

Q. Then what did you do?

A. We settled this paper. Bradner would not be in his office on Christmas, an attorney, that goes [158] without my saying it.

Q. As I understand you, you just testified you went to Bradner's office on Christmas day?

A. No, sir, on the 26th, when that was signed; I know what I am talking about.

Q. On the morning of the 26th, when you got up, what did you do first? A. I went out on my route.

Q. After your route was through, what did you do?

A. I went to Bradner's office.

Q. Did you go there alone, or was somebody with you? A. Alone.

Q. Who did you find at Bradner's office?

A. Pettenger met me there; I don't know whether another man came there or not to settle this.

Q. Was that the first time you had seen Pettenger after his San Diego trip? A. Yes, sir.

Q. You saw him at Bradner's office?

A. Yes, sir.

Q. Was Hatfield there?

A. I don't know whether he came up to Bradner's office, or not.

Q. Was Bradner there? A. Yes, sir.

(Testimony of William L. Sassaman.)

Q. What time of day was this? A. Afternoon.

Q. Of the 26th? A. Yes, sir.

Q. Had you seen Pettenger before you saw him at Bradner's office. A. No.

Q. Was this paper signed at Bradner's office.

A. Yes, sir.

Q. This amendment? A. Yes, sir.

Q. Then what was done as soon as it was signed?

A. I went home again.

Q. Did Pettenger go with you? A. No, sir.

Q. Did you have any talk with him, except in Bradner's office? A. No, sir.

Q. Tell us all he said in Bradner's office that day?

A. That is the day I asked him, I asked him "Where were you, that [159] you did not attend the creditors' meeting, you left me alone to fight these creditors, to settle up with them, and you had promised to be up there." He said, "I got a job to go to San Diego," he says "and I went down." I says, "Did you get any money"? He says, "The expenses of the boat." I says, "Where is the money"? He said he had to pay for the oil, and that the party would not go out on Christmas day because it rained, and he had to come back.

Q. Did he tell you it was a smuggling trip?

A. No, sir.

Q. Or that it was to smuggle Chinese?

A. No, sir, he said it was a charter party.

Q. A charter party? A. Yes, sir.

Q. Was that before or after he signed this?

A. That was before. I questioned him as soon as

(Testimony of William L. Sassaman.)

I saw him, I asked him where he had been.

Q. About signing this paper, what did you say when you handed that to him?

A. I just told him we made up that agreement. He says, "Yes," he would sign it. I says, "I made up that agreement."

Q. Did he take a copy of it?

A. Yes, sir, I think he has it yet.

Q. Did you have one for him? A. Yes, sir.

Q. After that was signed, how long did you stay at Bradner's office? A. I left and went home.

Q. How many minutes were you there?

A. I was not there more than five minutes.

Q. After this was signed, did he say that Fox had made a proposition to him to go to Mexico?

A. No, sir.

Q. Did he say that he had a chance proposition?

A. No, sir.

Q. Did you tell him to go ahead and take the boat?

A. He told me of no proposition, he offered me no proposition.

Q. Did he ask to go and you said you did not want to go? A. No, sir.

Q. Did he ask you if you were willing to put up your boat against his liberty? A. No, sir. [160]

Q. And did you answer him by saying to go ahead and use the boat to get some money in?

A. I did not talk on any subject of the kind.

Q. Now, tell us whether or not, after this paper was signed, Morris Pettenger said anything to you which you understood in any way referred to using

(Testimony of William L. Sassaman.)

this boat for Chinese or opium, or smuggling, or any illegal trip? A. No, sir.

Q. You heard Pettenger testify that he told you about having his name enrolled as master?

A. I heard him testify.

Q. Did he so tell you? A. No, sir.

Q. Did you ask him whose name was on the ship's papers?

A. No, sir, the ship's papers belonged to me.

Q. He never told you that he was master?

A. No, sir.

Q. Did you ever see his name on the ship's papers as master prior to here in court?

A. No, never before, excepting here.

Q. Now, when you first sent for him after the seizure of the boat whereabouts did you leave word?

A. I went to his home, 1603 Alamedas street, Long Beach, and he was not at home, and his father and mother were home, and of course, they were sorry for what happened. I waited a long time, and had supper with his father and mother, and they asked me to stay. He did not come. I left word there I wanted to see him. He came up a couple of days after to see me.

Q. Where? A. Los Angeles.

Q. When you saw him, did he say anything about your having known of the trip? A. No, sir.

Q. Didn't say a word about it? A. No, sir.

Q. What did he say?

A. He told me all right, like a man would tell me, he said, "I took a chance to help you. I realize you

(Testimony of William L. Sassaman.)

did a whole lot, I took a chance to make some money to pay Singleton.” [161]

Q. That is, he took the chance to help you out because you had done a lot? A. Yes, sir.

Q. What did he mean?

A. I had worked a lot to get a loan to pay the creditors, if we did not pay them, they would attach the vessel.

Q. Did he speak at all as if you had known about the trip? A. No, sir.

Q. What did he say when you first met him?

A. I could not tell you the conversation, just related to that; I understand this much, if I am allowed to say so, that Pettenger did try to help me out this way, which he said he did; because I had been working to get a loan from Singleton to pay off the creditors and he told me so. I am a man that would not—

Mr. HETTMAN.—(Intg.) That is immaterial, these side statements.

Mr. LLOYD.—Q. But did you know he was going to do it? A. No, sir, I did not.

Q. State whether or not Pettenger ever said to you, “We will get all the fucking coming to us”?

A. Mr. Pettenger did not relate to any Mexican trip or anything at all to me; that is, the statement he made was in the engine-room on one of the Sundays we were running to the Chinese junks, I was down there talking to him, I well remember the place, we were coming into the harbor, and I went down and talked to him, and he told me across the engine, he said in reference to these creditors—I don’t want you

(Testimony of William L. Sassaman.)

to mistake me in that—he said in reference to these creditors, “We were going to get all the fucking coming to us from these creditors,” meaning we could not pay them. I told him we would not, I said, “I could get Mr. Singleton to advance the money.”

Q. That did not have anything to do with this trip?

A. No, sir, nothing at all. [162]

Mr. HETTMAN.—We move that all that go out.

Mr. LLOYD.—All portions of that statement be stricken out.

The COMMISSIONER.—Yes.

Mr. LLOYD.—This question seems to have narrowed down to the question of what happened after the signing of this paper, and I am going to suggest, if it is within our powers here and if you are willing to allow these young men to ask each other questions while they are face to face, to see if we cannot determine what happened.

The COMMISSIONER.—That is not a regular way of proceeding. We have the statement here of Mr. Pettenger, and I was particular to interrogate him myself as to what was actually said, and we have gone over it several times, and he said it was about an hour after the signing of this agreement when he approached Mr. Sassaman and told him that he had a chance proposition, as he puts it. He said that he said nothing more to him. Then Mr. Sassaman said to him to go ahead and use the boat.

Mr. LLOYD.—We will not press that suggestion, then.

The COMMISSIONER.—We are confronted here

(Testimony of William L. Sassaman.)

with the proposition one witness says he made the statement, and the other denies that he made it.

Mr. LLOYD.—Q. How long, all told, were you at Bradner's office on the 26th day of December?

A. About five minutes.

Q. All told? A. Yes, sir, that is all.

Q. Was that the only time you had a conversation with Pettenger? A. That is all.

Q. On the 26th? A. Yes, sir.

Q. Did you see him about an hour after that?

A. No, sir.

Q. Or at all? A. No, sir, not at all.

Mr. LLOYD.—That is all. [163]

Cross-examination.

Mr. HETTMAN.—Q. Mr. Sassaman, you realize that you are under oath, do you not?

The COMMISSIONER.—There is no use going into that.

Mr. HETTMAN.—Q. When you drew up this paper, you were originally the master?

A. I did not draw it up.

Q. When you went there and signed up as master, you signed that on the 22d day of May?

A. I was not there. The papers were specially given to me by Mr. Morrow, for the "Calypso."

Q. You knew that you were master on the 22d day of May, didn't you? A. The 22d day of May?

Q. Yes? A. Most assuredly.

Q. Later on, you knew that Dickason was acting as master?

A. Yes, sir, certainly, I agreed he should be.

(Testimony of William L. Sassaman.)

Q. You agreed that the papers should be transferred to his name? A. Yes, sir.

Q. You also agreed that Lopes should become master? A. Yes, sir.

Q. Later on you agreed that Castle should become master?

A. Yes, sir, I was with Castle on the boat.

Q. And you saw the papers in his name?

A. Castle's name?

Q. Yes? A. Yes, sir.

Q. Later on, you knew that Castle had gone to Montana? A. No, sir, I did not.

Q. You learned sometime later that he had gone?

A. No, sir, I did not.

Q. When did you first learn that he had gone to Montana? A. In this court, on the 2d of April.

Q. Where did you think he was all the time?

A. In San Pedro.

Q. In what place in San Pedro?

A. I don't know where he lives, I used to see him around the water front and out on different boats.

[164]

Q. When Mr. Pettenger came to you on or about the 1st day of December and told you that he had transferred those papers in his name, do you remember you made some objection to it, but you did not make any attempt to re-transfer them to anyone else?

A. He never told me they were in his name on the first day of December, or at any other time.

Q. You realize you are under oath. You place

(Testimony of William L. Sassaman.)

your oath above dollars and cents?

A. Yes, sir, I certainly do.

Q. You would not jeopardize your interests under oath to save your money interest in this boat?

A. No, sir, I hold money too lightly for that.

Q. Let us hope so. Is it not a fact, that Mr. Pettenger came to you and in that conversation told you that those ship's papers were transferred in his name?

A. He did not, most assuredly; I am certain of it right here and say so in this court.

Q. And you objected to the transfer but no attempt was made to re-transfer it.

A. I did not know that they were in his name at any time.

Q. When he went to San Diego, and did not come to that creditors' meeting, when he came back and said he went down there with a charter party, you knew at that time he had gone down there to make the trip? A. No, sir.

Q. You realized that when he told you; when you saw him?

A. I says, "You cannot do that now, you are in for a great deal." I was sick of the whole thing, and I am not afraid to tell the truth in this court.

Q. You had that drawn up?

A. That was drawn up for the creditors' meeting.

Q. On the 26th day of December, after you had drawn up that subsequent contract, is it not a fact that Mr. Pettenger went over in [165] the barn-yard with you, and you went over there too fix up

(Testimony of William L. Sassaman.)

your account, and while there you and Pettenger had a talk about the trip to Mexico?

A. Mr. Pettenger will agree he never went with me to the barnyard of the Los Angeles Creamery Company or any other barnyard.

Q. You heard his testimony? A. I did.

Q. You knew very well at the creditors' meeting you had to get some money to pay the creditors, and you did not care how you got it. Is not that a fact?

The COMMISSIONER.—Proceed in order.

Mr. HETTMAN.—I want to get at the facts.

Q. Is it not a fact that you were talking with Pettenger, and you said you didn't care how he got the money, just so he got it?

A. I had no such conversation, and I can explain to you as an American citizen in this State, I did not have any conversation with him.

Q. You were anxious to have the boat make some money? A. I had the boat paid up.

Q. On what?

A. Mr. Singleton would go on my note.

Q. What were you going to do with the boat?

A. I was waiting for the Catalina season to open.

Q. You were going to make some money?

A. When the season opened.

Q. You were working pretty hard?

A. I had been working that way for six years.

Q. You did not have time to take the boat out?

A. Every time we had a trip, I was on the boat. I was on the boat every day.

Q. You did not have a chance to take the boat out

(Testimony of William L. Sassaman.)

to make some money? A. Yes, sir.

Q. At what hours?

A. Any time we had a trip on. I was trying to arrange for a trip to go to Guadalupe Island, but the [166] creditors could not get any papers to get into Mexico waters to make this trip. If we had made the trip we could get plenty of money; we could have sent 5000 goat skins.

Q. You realized Mr. Pettenger was your partner?

A. Yes, sir.

Q. While you were busy driving the wagon, he was running the boat? A. I was working with him.

Q. He was engineer and master?

A. He was not master. He was engineer for me; I was master.

Q. Where were you driving the wagon?

A. Mr. Pettenger was on the boat. I took the boat out every Sunday, week-day and holiday from the time the boat was built until I put another master on.

Q. How could you be master when Lopes, Dickason and Castle were masters?

A. I put them on. I went out still with him. I was managing owner and could take the boat at any time.

Q. You realize the difference between the master and managing owner? A. Certainly.

Q. Bear it in mind, then.

The COMMISSIONER.—We are not getting anywhere. Confine the cross-examination to what the witness testified.

(Testimony of William L. Sassaman.)

The WITNESS.—There is another fact—

Mr. HETTMAN.—Q. Never mind volunteering any information.

The WITNESS.—Why don't they allow the truth?

Mr. HETTMAN.—That is what we are trying to get at here. We want to hear the truth.

The WITNESS.—That is what I would like to have a chance to tell. If the Court please—

Mr. HETTMAN.—Never mind that.

The COMMISSIONER.—There is no use volunteering anything. The district attorney will bring out the facts.

Mr. HETTMAN.—Q. Is it not a fact that on the 26th day of December you had a talk with Mr. Pettenger, in which you wanted [167] to make the boat earn some money? A. No, sir.

Q. Is it not a fact that Mr. Pettenger came to see you on that morning, and you had these papers signed, and you asked him how much money he made on the trip to San Diego?

A. I asked him what he made, and he told me he made running expenses.

Q. Were you worried about the boat making money?

A. The boat was paid up. The boat was all right until spring.

Q. You had creditors? A. No, sir.

Q. What about Mr. Singleton?

A. He says, "You don't need to give me a mortgage"; he says, "Give me your note, Billy." That is all he asked for, and he has no mortgage today.

(Testimony of William L. Sassaman.)

Q. You wanted the boat to be a profit, and not a loss? A. Most assuredly.

Q. And you had Pettenger aboard the ship, there, working as master and running this boat on little trips, trying to make some money to keep her in repairs until the season opened up?

A. No, sir, I did not.

Q. In that barnyard you heard Mr. Pettenger tell you, he came to you and he said, "I have a proposition to go to Mexico to make some money," and he says in his statement, "Will you put up your boat against my liberty," and he says you agreed to that?

A. I swear in this court that I made no such statement, and that Morris did not make it to me; that he did not see me in the barnyard on the 26th day of December.

Q. Anywhere else did he say those things to you?

A. I was only five minutes in the law office.

Q. Did he make that statement?

A. He did not.

Q. You emphatically deny any such statement?

A. All the statements he made.

Mr. HETTMAN.—That is all.

Mr. LLOYD.—Here are some letters of October 17, 22d, 31st, [168] and December 13th, from Mr. Singleton to Sassaman. We would like to put those in evidence.

Mr. HETTMAN.—I object to their going in. I don't see what Mr. Singleton has to do with the case at all. The only question here is, was Pettenger acting as master when he brought these Chinese up here

in March, 1914. I think this is simply burdening the record with a lot of immaterial matter.

Mr. LLOYD.—It shows his good faith in going after money from Mr. Singleton, instead of going after Chinamen. It shows exactly what his frame of mind was.

Mr. HETTMAN.—I object to it going into the record.

The COMMISSIONER.—The objection is sustained.

Testimony closed.

[Endorsed]: Filed June 15, 1914. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [169]

*In the District Court of the United States for the
Northern District of California, First Division.*

#15,522.

THE UNITED STATES OF AMERICA,

vs.

The Gasoline Launch "CALYPSO," Her Boats,
Tackle, Apparel, Furniture and Cargo.

**Report and Findings of Fact of United States
Commissioner.**

To the Honorable, The District Court of the United
States for the Northern District of California,
First Division.

I, the undersigned United States Commissioner
to whom this cause was referred to take the proofs
and to ascertain and report the facts on the issues

joined therein, and which by stipulation at the hearing, is made to include matters affirmatively set up in the answers of the respective intervenors and claimants, do hereby report that I was attended and the proceedings were had as set forth in the testimony accompanying this report, and which is made a part hereof, and

After a careful consideration of the evidence adduced before me, I find the facts to be as follows:

1. That at all the times mentioned in the pleadings herein and for a long time prior thereto, the gasoline launch "Calypso," her boats, tackle, apparel and furniture, were the property of one William L. Sassaman and one Morris Pettenger, and that said Sassaman and Pettenger owned said vessel, her boats, tackle, apparel and furniture in the following proportions, to wit: William L. Sassaman an undivided five-sixths thereof, and Morris Pettenger an undivided one-sixth thereof. [170]

2. That said gasoline launch "Calypso" has been seized by the United States Marshal for the Northern District of California, and is now in his custody and control under and by virtue of proceedings had in this cause.

3. That on the 16th day of January, 1914, the said gasoline launch "Calypso" arrived in the United States at the port of Monterey in the State and Northern District of California from a foreign port, to wit, a port in the Republic of Mexico, and said gasoline launch at said time and place had on board as master thereof, the above-mentioned Morris Pettenger.

That at the time said gasoline launch "Calypso"

landed in the said port of Monterey as aforesaid, she had on board sixteen Chinese passengers. That the said Morris Pettenger, master as aforesaid, knew that said Chinese passengers were on board said vessel and said Morris Pettenger, master as aforesaid, knowingly and wilfully failed, neglected and refused to deliver a manifest of any kind or character pursuant to law or otherwise, of the cargo of said vessel, to any person or persons whatsoever, and did likewise at said time and place, knowingly and wilfully fail, neglect and refuse to make any report of any kind of the entry of said vessel in said port pursuant to law.

4. That particularly, the said Morris Pettenger, master of said gasoline launch "Calypso" as aforesaid, did knowingly and wilfully fail, neglect and refuse to deliver and report, or deliver or report, to immigration Inspector of the United States, Wm. H. Chadney, in charge of the district in which said vessel had arrived, before landing or permitting to land any of said Chinese passengers, a separate list, or any list, of all or any of the Chinese passengers then on board of said vessel, who had been taken on board thereof [171] at a port in the Republic of Mexico, and likewise the said Morris Pettenger, master as aforesaid, knowingly and wilfully failed, neglected and refused to deliver to said immigration inspector in charge of said district, a list, or any list, of any passengers on board as aforesaid, in violation of the provisions of section 8 of the Act of Congress of May 6th, 1882, as amended by the Act of Congress of July 5th, 1884.

5. That said Morris Pettenger, who was then and there the master of said gasoline launch "Calypso," as aforesaid, did, on or about the 12th day of January, 1914, from a place known as Sales Reyes near the port of Ensenada in the Republic of Mexico, take on board said vessel sixteen Chinese passengers, the names of whom are unknown, and did then and there transport the said Chinese passengers to the United States of America by means of said gasoline launch "Calypso," and did, on the 16th day of January, 1914, in violation of law, land the said sixteen Chinese passengers in the United States of America, at the port of Monterey in the State and Northern District of California, from said vessel, and did so land said Chinese passengers from said vessel before the Chinese inspector in charge of the district in which said vessel arrived, or his deputy, or any other officer of the United States, had proceeded to examine, or had a chance to examine such Chinese passengers, or any of them, touching their right to be allowed to land in the United States, all of which was in violation of the provisions of section 9 of the Act of Congress of May 6th, 1882, as amended by the Act of Congress of July 6th, 1884.

6. That the said Morris Pettenger, who was then and there the master of the said gasoline launch "Calypso" as aforesaid, did unlawfully, wilfully and knowingly aid and abet the landing in the United States from said vessel, of sixteen Chinese passengers, the [172] names of whom are unknown and who were not legally entitled to enter the United States because they had not proved their right to

enter the said United States to the satisfaction of any proper officer of immigration of the United States, and at a time when said Chinese passengers had not been admitted to the United States by any officer of immigration of the United States pursuant to law, in violation of section 11 of the Act of Congress of May 6th, 1882, as amended by the Act of Congress of July 5th, 1884.

And I do further find, touching the issues made by the answer and amended answer of Wm. L. Sassaman and Wm. H. Singleton, as follows:

1. That on the 16th day of January, 1914, and for a long time prior thereto, and at all times herein mentioned, Wm. L. Sassaman was the owner of a five-sixth interest in the gasoline launch "Calypso," her boats, tackle, apparel and furniture, and the other undivided one-sixth interest was, during the same time, owned by Morris Pettenger.

2. That Morris Pettenger was, on the 16th day of January, 1914, and at all times informed of in this libel, the master of said gasoline launch "Calypso," and authorized to act as master of such vessel.

3. That said Morris Pettenger was the master of said vessel as alleged in the libel, and that said Morris Pettenger was acting as master of said vessel and did the acts informed of in the libel at the time he was the master of said vessel, and acting as such, and during all of said times informed of in the libel, the said Morris Pettenger was acting with the consent and knowledge of claimant, Wm. L. Sassaman, but without the knowledge or consent of the intervenor Wm. H. Singleton.

And in this behalf, I further find, that at the time of the [173] voyage alleged in the libel, and at the times of the acts informed of therein, the said vessel was not stolen from Wm. L. Sassaman, or any other person, but the said vessel was, at all times during said voyage informed of in the libel, being navigated by Morris Pettenger as master thereof, with the knowledge and consent of the said claimant, Wm. L. Sassaman.

4. That said Wm. H. Singleton has a *bona fide* claim of thirty-four hundred dollars, for advances, supplies and repairs, furnished for, and used in and for said vessel, and that on December 23, 1913, the said Wm. H. Singleton was entitled to have executed to him by Wm. L. Sassaman and Morris Pettenger, a mortgage upon said vessel for the sum of thirty-four hundred dollars, with interest at eight per cent per annum, with the right to have delivered to him a policy of insurance of five thousand dollars, upon said vessel.

5. That on the 23d day of December, 1913, the said gasoline launch "Calypso" was heavily in debt and tied up in the inner harbor of Long Beach and it was expressly agreed by and between the said Wm. L. Sassaman and said Morris Pettenger that said Pettenger had no authority to make any contract concerning said "Calypso," or take said vessel out on any trip without a permit from said Wm. L. Sassaman, and would borrow no money, nor give any personal note on the "Calypso" at any time, and not to employ a crew without a permit from said Wm. L. Sassaman, and that under no circumstances should

the ship's papers be transferred to any one except by Wm. L. Sassaman, and that said Wm. L. Sassaman was the managing owner of said "Calypso."

But, I further find, that on the said 23d day of December, 1913, the ship's papers had already been transferred to the said Morris Pettenger, and the said Morris Pettenger was then and there the registered master of said vessel, and that said Wm. L. Sassaman [174] on said day, and prior thereto, and continuously and at all times subsequent thereto, had knowledge of the fact that the said Morris Pettenger was the registered master of said vessel.

5. That said Wm. L. Sassaman gave his consent and permission to the said Morris Pettenger to operate and navigate said vessel on the trip or voyage which brought about her seizure as aforesaid.

6. That on or about the 24th day of November, 1913, said Morris Pettenger did, without the knowledge of the said Wm. L. Sassaman, secure a transfer of the ship's papers to himself, and did cause himself to be named as master of said vessel by the United States Collector of Customs at San Pedro, California, and that while the said Wm. L. Sassaman did not have knowledge of the act at the time it was done, he did thereafter, and prior to the making of the voyage informed of in the libel herein, know that the transfer had been made, and that the said Morris Pettenger with the consent and permission of the said Wm. L. Sassaman operated and navigated the said vessel as the master thereof during the times informed of in the libel herein.

7. I further find that the said Wm. L. Sassaman

did not discover the fact that the ship's papers had been transferred to Morris Pettenger on the 7th day of March, 1914, but on the contrary find that prior to the time of the making of the voyage informed of in the libel, the said Wm. L. Sassaman had knowledge of the transfer of the ship's papers to the said Morris Pettenger.

8. I further find that the claim of Wm. H. Singleton is *bona fide* and just in that the said Wm. H. Singleton had no part in any of the matters informed of in the libel. It is, however, not attempted to find that the said Wm. H. Singleton is entitled to any right whatever as against the United States of America in said vessel. [175]

Touching the issues raised by the petition in intervention of the Los Angeles Creamery Company, a corporation, I do find as follows:

1. That the said intervenor has *bona fide* claims for the principal sum of \$500, evidenced by a promissory note secured by a chattel mortgage against said vessel, bearing date April 30th, 1913, and also by a promissory note secured by a second chattel mortgage against said vessel, bearing date September 16th, 1913, for the principal sum of \$300, the whole amount unpaid on said notes being \$760, and the sum of \$760 remains due and unpaid on said promissory notes, and likewise sundry installments of interest are due and unpaid on said notes, according to the terms and tenor thereof, and such sums are secured by chattel mortgages duly executed and recorded as set forth in the petition in intervention against the vessel herein. It is not intended to find, however,

that these claims are of any value as against the United States of America.

I further submit as a part of this report and findings the testimony taken at the hearings and also the briefs of respective counsel herein.

All of which is respectfully submitted.

FRANCIS KRULL, [Seal]

United States Commissioner, Northern District of California.

Dated June 15, 1914.

[Endorsed]: Lodged Jun. 15, 1914. W. B. Mal-
ing, Clerk. By C. W. Calbreath, Deputy Clerk.

Presented in open court and filed Jun. 26, 1914.

W. B. MALING,
Clerk.

By Lyle S. Morris,
Deputy Clerk. [176]

*In the District Court of the United States, in and for
the Northern District of California, First Divi-
sion.*

IN ADMIRALTY.—No.15,522.

THE UNITED STATES OF AMERICA,

vs.

The Gasoline Launch "CALYPSO," Her Boats,
Tackle, Apparel, Furniture and Cargo.

Exceptions to Report of Commissioner.

The claimants and intervenors William L. Sassaman, William L. Singleton and Los Angeles Creamery Company hereby object and except to the report of the Commissioner made and filed herein and say

that there is manifest error in the following particulars:

1. That it is uncertain under the order of reference and stipulation herein what the power, authority and jurisdiction of said commissioner is; and that it does not appear that the Commissioner was sworn to try said cause or had authority or jurisdiction to try said cause.

2. That the Commissioner erred in attempting to report upon the facts herein and in asking a stipulation that he should find the facts herein.

3. That the question as to who is master of the "Calypso" is a question of law and not of fact herein, and that said Commissioner erred in attempting to treat said question as a question of fact in the manner found by him.

4. That the Commissioner erred in mingling questions of fact and questions of law herein.

5. That the Commissioner erred in concluding what were questions of fact herein.

6. That there is no evidence to support that portion of paragraph "3," page 2, which finds that Morris Pettenger was master [177] of said "Calypso."

8. That there is no evidence to support that portion of paragraph "4," page 3, which finds that Morris Pettenger was master of said "Calypso."

9. That there is no evidence to support that portion of paragraph "5," pages 3 and 4, which finds that Morris Pettenger was master of said "Calypso."

10. That there is no evidence to support that portion of paragraph "6," page 4, which finds that Mor-

ris Pettenger was master of said "Calypso."

11. That there is no evidence to support paragraph "2," page 5, or any portion of the report, which finds:

"2. That Morris Pettenger was, on the 16th day of January, 1914, and at all times informed of in this libel, the master of said gasoline launch "Calypso," and authorized to act as master of such vessel."

or finds to that effect; but on the contrary the evidence shows (Deposition of Pettenger, page 5, and Claimants' Exhibit A) that said Pettenger was precluded and prohibited from acting as master of the "Calypso," and was without authority so to do by reason of his having executed an agreement, dated December 23d, 1913, in words and figures as follows:

"This amendment made this twenty-third day of December, 1913, in consideration that Wm. H. Singleton agrees to pay promissory notes to the amount of \$3400.00 which amount clears the indebtedness of the "Calypso." I, William L. Sassaman, and I, Morris Pettenger, agrees to give said Wm. H. Singleton a mortgage on the "Calypso" for the amount of \$3400.00 with interest at 8%, and deliver to Wm. H. Singleton the insurance policy which amounts to \$5000.00, and further, that I, Morris Pettenger agrees to make no contracts or take the "Calypso" out on any trip without a permit from Wm. L. Sassaman, also that I, Morris Pettenger, agrees to borrow no money or give any personal note at any time on the "Calypso." It is also agreed that I, Morris [178] Pettenger, shall not employ a crew without

a permit from Wm. L. Sassaman, and under no circumstances shall the ship's papers be transferred to anyone except by W. L. Sassaman.

WM. L. SASSAMAN.

MORRIS PETTENDER,

Witnessed by Louise E. Grimaud."

12. That there is no evidence to support that portion of paragraph "3," page 5, which finds that Morris Pettenger was master of said "Calypso."

13. That there is insufficient evidence to support that portion of paragraph "3," page 5, which finds that Morris Pettenger was acting with the knowledge and consent, or knowledge or consent of Wm. L. Sassaman; or that portion which finds that said vessel was not stolen from Wm. L. Sassaman; or that finds that said vessel was being navigated by Pettenger with the knowledge and consent, or knowledge or consent of Sassaman.

14. The findings are conflicting and uncertain in that the Commissioner finds:

"That on the 23d day of December, 1913, the said gasoline launch "Calypso" was heavily in debt and tied up in the inner harbor of Long Beach and it was expressly agreed by and between the said Wm. L. Sassaman and said Morris Pettenger that said Pettenger had no authority to make any contract concerning said "Calypso," or take said vessel out on any trip without a permit from said Wm. L. Sassaman, and would borrow no money, nor give any personal note on the "Calypso," at any time, and not to employ a crew without a permit from said Wm. L. Sassaman, and that under no circumstances should

the ship's papers be transferred to anyone except by Wm. L. Sassaman, and that said Wm. L. Sassaman was the managing owner of said "Calypso."

and also finds that Pettenger was master of the "Calypso."

15. That the Commissioner erred in deciding, and was without jurisdiction to decide, after finding that Morris Pettenger had been registered as master of the "Calypso," without the knowledge or consent of Sassaman, that the agreement mentioned in paragraphs [179] 11 and 14 of these exceptions did not prohibit Pettenger from acting as master of the "Calypso."

16. That the Commissioner made an erroneous decision in deciding in paragraph "5," page 7:

"That said Wm. L. Sassaman gave his consent and permission to the said Morris Pettenger to operate and navigate said vessel on the trip or voyage which brought about her seizure as aforesaid."

and in deciding in paragraph "6," page 7:

" * * * that the said Morris Pettenger with the consent and permission of said Wm. L. Sassaman operated and navigated the said vessel as the master thereof during the times informed of in the libel herein."

That there is insufficient evidence to support said findings.

That said finding (paragraph 5 above) is uncertain in that it cannot be determined therefrom whether said Sassaman had knowledge of the illegal part of the trip or voyage which brought about the seizure of the "Calypso." That there is no evidence

to support the finding that William L. Sassaman consented to any illegal trip or voyage of the "Calypso" or consented to any trip or voyage whatever after the signing of the agreement mentioned in paragraphs 11 and 14 of these exceptions.

17. That the evidence is wholly insufficient to support the finding that Sassaman discovered the fact that the ship's papers had been transferred to Morris Pettenger prior to the time of the making of the voyage informed of in the Libel.

18. That said report is insufficient and incomplete in that the Commissioner does not find whether the Los Angeles Creamery Company is an innocent and *bona fide* owner of the mortgages mentioned on page 8 of said report. [180]

19. That said report is wholly insufficient and incomplete in that said Commissioner does not find whether or not William L. Sassaman was a party to the smuggling trip of Morris Pettenger or consented to the same as such, or consented to any taking out of the "Calypso" after December 23d, 1913, the date of the agreement whereby Pettenger agreed not to take the boat out. This is vital to the case and should be found upon explicitly. The only evidence herein that in any way connects Sassaman with the smuggling trip is the statement of Pettenger that he got Sassaman's permission. Pettenger admits the word "Chinese" was not used and says that he made his arrangement about one hour after signing the agreement not to take the "Calypso" out. We refer to Transcript pages 77, 78, 79 and the evidence quoted on pages 2, 3, 4, 5 and 6 of Intervenor's clos-

ing brief filed with Commissioner and submitted with his report herein. Pettenger states the conversation was had at the barnyard of the Los Angeles Creamery Company (Transcript pages 77, 78 and 79). This is flatly denied by Sassaman (Transcript page 89). The uncontradicted evidence of Pettenger is insufficient to show any consent or knowledge on the part of Sassaman with reference to a smuggling deal, and as read in the light of the circumstances of the case is wholly insufficient to support such a finding. The written agreement was not departed from. We believe Pettenger never went to the barnyard on December 26th, 1913, at which place and time he testified this single vital conversation took place. In support of this contention and of the fact that Sassaman has acted in the highest good faith, with reference to the "Calypso," we attach hereto and make a part of these exceptions, affidavits of the following persons: [181]

John F. Giffin.

Charles A. Farron.

William H. Elder.

George M. Harrison.

E. H. O'Brian.

W. F. Mahar.

Joseph Adams.

Ira T. Henderson.

Claimants and Intervenors respectfully ask that said report be not confirmed, but rejected and set aside; that the Court hear the questions of mixed law and fact involved herein, and that additional evidence be taken herein to cover the questions raised by the affidavits attached to these exceptions, and for such other and further orders and relief in the

premises as may be meet.

Respectfully submitted.

BLACK & CLARKE.

LLOYD, CHENEY & GEIBEL,

Proctors in Admiralty for William L. Sassaman,
William H. Singleton and Los Angeles Creamery
Company, Claimants and Intervenors. [182]

*In the District Court of the United States, in and for
the Northern District of California, First Divi-
sion.*

IN ADMIRALTY—No. 15,522.

THE UNITED STATES OF AMERICA,

vs.

The Gasoline Launch "CALYPSO," Her Boats,
Tackle, Apparel, Furniture and Cargo.

**Affidavit of John H. Giffin on Application for
Taking of Additional Evidence.**

State of California,

County of Los Angeles,—ss.

JOHN H. GIFFIN, being first duly sworn, de-
poses and says:

My age is 67 years. I reside at 512 East Sixteenth
Street, Los Angeles, California, and have worked for
the Los Angeles Creamery Company for about five
years. I take care of horses from about 4:30 A. M.
to 4:30 P. M.

I have known William L. Sassaman for a little
over five years.

I know Morris Pettenger by sight. I was work-

ing for the company at its big barn on San Pedro Street, Los Angeles, California, during December, 1913. That is the only barn of the company where Sassaman or Pettenger ever worked, and that is where Sassaman had his room.

I saw Sassaman the day after Christmas, 1913, I think it was about 8:30 in the morning, his usual time of coming in with his wagon when he was not collecting. I remember that day he told me he had been up to Beaumont the day before, which was Christmas, and for me to tell old Mr. Daniels that he had everything fixed up [183] all right. Daniels was a man who had worked for Mr. Sassaman, and Mr. Sassaman owed him money. He told me he had gotten a note and was going to get the money. I don't think I saw Sassaman later that day.

I did not see Pettenger that day at all. I hadn't seen him before that day for some time, and I don't believe I saw him until quite a while after. I would likely have seen him if he had come to the barn.

JOHN H. GIFFIN.

Subscribed and sworn to before me this 3d day of July, 1914.

[Seal]

C. K. SCHADE,

Notary Public in and for the County of Los Angeles,
State of California. [184]

*In the District Court of the United States, in and for
the Northern District of California, First Division.*

IN ADMIRALTY—No. 15,522.

THE UNITED STATES OF AMERICA,

vs.

The Gasoline Launch "CALYPSO," Her Boats,
Tackle, Apparel, Furniture and Cargo.

**Affidavit of William H. Elder on Application for
Taking of Additional Evidence.**

State of California,
County of Los Angeles,—ss.

WILLIAM H. ELDER, being first duly sworn,
deposes and says:

My age is 32 years. I reside at 686 East Forty-fifth Street, Los Angeles, California. I am foreman of the barn and blacksmith shop, of the Los Angeles Creamery Company. I have worked for said company, and before that for Bell-Vernon Farms Company, about ten years, and have known William L. Sassaman for about ten years.

I was on duty at the large barn of the company during December, 1913, my hours of work being from seven A. M. until 5 P. M. I remember about Sassaman going to Singleton's place at Beaumont and coming back on the morning after last Christmas. He came in close to eight o'clock,—it might have been half an hour either way. While he was unhitching his horses I was talking to him. He told

me that he had been out there and got it straightened up, that he was going to save the boat. That was the next morning after Christmas.

I saw him again in the afternoon of that day. He came to the blacksmith shop to settle for some work we had done for the [185] boat. He said he had a note from Mr. Singleton for it, and I told him I didn't have anything to do about that part, to take it to Mr. Henderson, the manager of the company, at the office. Then he said he was going to bed. Pettenger was not with him.

I know Morris Pettenger, and have known him for about two years. I didn't see him at all on that day (the day after Christmas, 1913).

Sassaman was at that time sleeping in a room just above the blacksmith shop, right next to the harness shop. He was upstairs in the harness shop when he offered me this note. This is next to his bedroom. He told me he was going to bed. After he offered me the note I didn't see him any more that day. I think I would have seen him if he had come down or been about. In my position I generally saw what was going on, and was about the barn all that day. I think Sassaman did not come down again until he took his wagon out the next morning about two o'clock, when I would be off duty.

The barn and yard where I worked had only one entrance, on San Pedro Street, through which all wagons and employees went, and it was easy for me to see all who came and went.

WILLIAM H. ELDER.

Subscribed and sworn to before me this 3d day of July, 1914.

[Seal]

C. K. SCHADE,
Notary Public in and for the County of Los Angeles,
State of California. [186]

*In the District Court of the United States, in and for
the Northern District of California, First Division.*

IN ADMIRALTY—No. 15,522.

THE UNITED STATES OF AMERICA,

vs.

The Gasoline Launch "CALYPSO," Her Boats,
Tackle, Apparel, Furniture and Cargo.

**Affidavit of E. J. O'Brian on Application for Taking
of Additional Evidence.**

County of Los Angeles,—ss.

State of California,

E. H. O'BRIAN, being first duly sworn, deposes
and says:

My age is 59 years, and I reside at 178 West
Thirty-sixth Place, Los Angeles, California.

I have worked for the Los Angeles Creamery Com-
pany for three years in October. I got acquainted
with William L. Sassaman a couple of weeks after I
got there and began work. My work is blacksmith-
ing.

I was working for the company December, 1913,
in their shop about 75 feet back from San Pedro
Street and about 40 feet from the company's big

barn. Sassaman's room was directly over my blacksmith shop. I worked from seven A. M. to five P. M., and working that day after Christmas, 1913.

I would see Sassaman nearly every day when he came to wash. The wash basins were between the automobile shop and the blacksmith shop.

I know Morris Pettenger well. The last time I saw him was a few days before he went up to receive his sentence. I saw him then in the blacksmith shop.
[187]

I did not see him at all on the day after Christmas, 1913. I would likely have seen him if he had been about the shop or barn because he very seldom came about the place without he came to the blacksmith shop from the automobile shop.

E. H. O'BRIAN.

Subscribed and sworn to before me this 3d day of July, 1914.

[Seal]

C. K. SCHADE,

Notary Public in and for the County of Los Angeles,
State of California. [188]

*In the District Court of the United States, in and
for the Northern District of California, First
Division.*

IN ADMIRALTY.—No. 15,522.

THE UNITED STATES OF AMERICA,

vs.

The Gasoline Launch "CALYPSO," Her Boats,
Tackle, Apparel, Furniture and Cargo,

**Affidavit of Joseph Adams, on Application for
Taking of Additional Evidence.**

State of California,

County of Los Angeles,—ss.

JOSEPH ADAMS, being first duly sworn, deposes and says:

My age is 29 years. I reside at 1427 E. 22nd Street, Los Angeles, California.

I have worked for the Los Angeles Creamery Company, taking care of horses, for two years, and have known William L. Sassaman about two years.

I know Morris Pettenger by sight. I was working the day after Christmas, 1913. I took care of Sassaman's horses that day. He got in between eight and nine o'clock—around there. I did not see Pettenger that day at all. I was about the barn all that day. I would likely have seen Pettenger if he had been about the barn that day. If he came through the yard I would surely have seen him. That would have been his usual way of coming in.

The last time I saw Pettenger was a good while before last Christmas.

JOSEPH ADAMS.

Subscribed and sworn to before me this 3d day of July, 1914.

[Seal]

C. K. SCHADE,

Notary Public in and for the County of Los Angeles,
State of California. [189]

In the District Court of the United States, in and for the Northern District of California, First Division.

IN ADMIRALTY.—No. 15,522.

THE UNITED STATES OF AMERICA,

vs.

The Gasoline Launch "CALYPSO," Her Boats,
Tackle, Apparel, Furniture and Cargo,

**Affidavit of Charles A. Farron on Application for
Taking of Additional Evidence.**

State of California,

County of Los Angeles,—ss.

CHARLES A. FARRON, being first duly sworn,
deposes and says:

My age is 42 years. I reside at 1010½ San Pedro
Street, Los Angeles, California.

I was working for the Los Angeles Creamery Company December, 1913, washing wagons.

I have known Wm. L. Sassaman three years October 24th.

I know Morris Pettenger. He worked in the automobile shop. I have seen him around there for about two years.

I was working the day after Christmas.

My hours are from 7 A. M. to 5 P. M. I have been with the company going on three years in October.

I saw Sassaman that day. I take his wagon every day when he comes in. He got in between the hours of eight and nine, I couldn't say exactly when. I took his wagon that day and washed it.

All I know about his going to Beaumont to see Mr. Singleton is that when he came in the day after Christmas I was joshing [190] him about celebrating Christmas. He said he had been out to Singleton's and that he was going to bed, that he was all in.

I did not see Morris Pettenger that day. I was about the barn all day and if he had been up through that yard I would have seen him.

I saw Sassaman in the yard that day when he got back—and went to bed. Pettenger was not with him. I should judge it was close to eleven o'clock.

I don't think I saw Pettenger for quite awhile before Christmas, 1913, and have seen him only once since, I think it was about April or May last that I saw him.

CHARLES A. FARRON.

Subscribed and sworn to before me this 3d day of July, 1914.

[Seal]

C. K. SCHADE,

Notary Public in and for the County of Los Angeles,
State of California. [191]

*In the District Court of the United States, in and
for the Northern District of California, First
Division.*

IN ADMIRALTY.—No. 15,522.

THE UNITED STATES OF AMERICA,

vs.

The Gasoline Launch "CALYPSO," Her Boats,
Tackle, Apparel, Furniture and Cargo.

**Affidavit of George M. Harrison on Application for
Taking of Additional Evidence.**

State of California,
County of Los Angeles,—ss.

GEORGE M. HARRISON, being first duly sworn,
deposes and says:

My age is 32 years, and I reside at 1557 Myrtle Avenue, Glendale, California.

I have worked for the Los Angeles Creamery Company five years. During December, 1913, I was time keeper and assistant to the manager in the automobile department.

I have known William L. Sassaman three years, and know Morris Pettenger.

I did not see Morris Pettenger on the day after Christmas, 1913. I was at work on that day. I saw Sassaman when he came in off his route that day, the usual time at which he comes off the job in the forenoon.

He and I talked some about the "Calypso" affairs that day. I remember talking with him in regard to his going to Singleton's in regard to his getting notes or a loan. After he put up his horses, as I remember, he said something about going up town and signing this note, to Singleton's. I saw him after he got [192] back from his attorneys' office. I did not see Pettenger around there with him. I did not see Pettenger that day at all.

I can't give the conversation exactly. As I remember the affair, Sassaman owed us an account for labor and material for the boat and he told me that

the account was to be paid now by this note. I told him that we didn't have the money, and he said he would get a receipt from the office that he could turn the note in on payment of our automobile shop account. He said it was all right. I can't remember the exact words. This talk was after he got back from his attorneys about eleven o'clock.

When Pettenger came there he usually came into the office where I was and visited. I had known him for a long while, about three years, I should say. He worked in the same department I did, for about two and one-half years.

I know where Mr. Sassaman had his room during December, 1913. From where I worked I could observe anyone going to the room with him. After he left me he started toward his room. Mr. Pettenger was not with him and I do not think was about the place that day, December 26, 1914.

GEORGE M. HARRISON.

Subscribed and sworn to before me this 8th day of July, 1914.

[Seal]

C. K. SCHADE,

Notary Public in and for the County of Los Angeles,
State of California. [193]

*In the District Court of the United States, in and
for the Northern District of California, First
Division.*

IN ADMIRALTY.—No. 15,522.

THE UNITED STATES OF AMERICA,

vs.

The Gasoline Launch "CALYPSO," Her Boats,
Tackle, Apparel, Furniture and Cargo,

**Affidavit of W. F. Mahar on Application for Taking
of Additional Evidence.**

State of California,

County of Los Angeles,—ss.

W. F. Mahar, being first duly sworn, deposes and
says:

My age is forty-two years, and I reside at No. 1123
Park Avenue, (Wilmington), Los Angeles, Cali-
fornia.

I am deputy U. S. Collector of Customs for the
Port of Los Angeles, with office at Room 312 Federal
Building, Los Angeles, California.

I know Wm. L. Sassaman. I got acquainted with
him when he was having the boat "Calypso" built.
I measured said boat for documents. Documents
were issued May 22, 1913. After that I do not re-
member seeing anything of Sassaman until about
four months ago. Then Sassaman came in my office,
312 Federal Building, and asked me if I knew any-
thing about the endorsement of Morris Pettinger as
master of the "Calypso." I replied that I would
look it up. I did so and found that Pettenger had

been endorsed as Master on the Ship's papers at San Pedro. Sassaman expressed surprise and asked me who gave them authority to do it. I told him to see the deputy at San Pedro who did it.

Mr. Sassaman tells me said visit was March 7th, 1914. That would be about the right time.

W. F. MAHAR.

Subscribed and sworn to before me this 6th day of July, 1914.

[Seal] CHAS. J. W. SJOBERG,
Notary Public in and for the County of Los Angeles,
State of California. [194]

*In the District Court of the United States, in and
for the Northern District of California, First
Division.*

IN ADMIRALTY.—No. 15,522.

THE UNITED STATES OF AMERICA,

vs.

The Gasoline Launch "CALYPSO," Her Boats,
Tackle, Apparel, Furniture and Cargo,

**Affidavit of Ira T. Henderson on Application for
Taking Additional Evidence.**

State of California,

County of Los Angeles,—ss.

IRA T. HENDERSON, being first duly sworn, deposes and says:

My age is thirty-nine years. I reside at 854 East Adams Street, Los Angeles, California. I am a director of the Los Angeles Creamery Company and

have had active charge of its retail and delivery department for about seven years.

I know William L. Sassaman well. He has worked under me in said Company, and before that with the Belle-Vernon Farms Company of which I was an officer. He has been a faithful conscientious employee.

I remember the circumstances of Sassaman building the "Calypso" and getting in debt with it. I was consulted at the time the Los Angeles Creamery Company loaned him the money secured by Chattel mortgages, concerning which the Los Angeles Creamery Company has intervened in this proceeding.

I remember about the trip of Sassaman's to Mr. Singleton's ranch near Beaumont, Riverside County, California, on the day before Christmas, 1913, getting back early Christmas morning. I saw him Christmas morning after he came in from his route, and he told me he had traveled all night and had gotten in about three o'clock [195] A. M., and gone out immediately on his milk route. I saw him at the office when he was reporting, after returning from his delivery route.

I was frequently at the Company's barn at 1158-1170 San Pedro Street. It has a main entrance through which employees come. The only other used entrance was through the auto shop. I was about said barn more or less Christmas, 1913, and the day after. I did not see Morris Pettenger about said barn or at any time on said day. I know him well and would remember if I had seen him then.

In the early part of January, 1914, I remember

Mr. Sassaman coming back from a trip to San Pedro or Long Beach. Sassaman said, "I just went down to San Pedro and they tell me that Pettenger has taken the "Calypso" and taken on a lot of distillate and gone out on a trip. That is contrary to our agreement. We have an agreement whereby he was to report to me or take up with me everything before he went on a trip." And also, that they had said at Long Beach that Pettenger was out on a smuggling trip. And Sassaman said he thought he ought to get out a warrant and have Pettenger arrested. I told him I didn't think that he should, that Pettenger was all right; that he was his partner and he would probably find out that he was all right and had tried to get hold of him and hadn't been able to; that the trip would come out all right; that Pettenger was all right simply hustling for the money.

This was before the papers had any word about the seizure of the "Calypso" at Monterey. I feel sure that Sassaman at that time knew nothing of the smuggling trip. He was indignant that Pettenger had taken the boat out. I had no idea that Pettenger was on a smuggling trip and therefore dissuaded Sassaman from trying to have him arrested.

It would be, I suppose, ten days after that, when the [196] papers published an account of the seizure of the "Calypso." Several days before that Sassaman saw me again and told me that he had heard that the boat had been at San Diego. At those times he was talking to me, he evidently did not know about the movements of the boat and was trying to find out what was up.

IRA T. HENDERSON.

Subscribed and sworn to before me this 8th day of July, 1914.

[Seal]

C. K. SCHADE,

Notary Public in and for the County of Los Angeles,
State of California.

[Endorsed]: Filed Jul. 11, 1914. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [197]

Amendments to Exceptions to Comm. Report.

Interline Amendment to Exceptions.

Strike out "Los Angeles from line 26, page 4.

Strike out all line 27, page 4, except the last word
"Mort-"

Change period to comma at end of line 28, page 4, and add: "were given for the purpose alleged in paragraph III of the answer of Los Angeles Creamery Company."

[Endorsed]: Filed July 16, 1914. W. B. Maling,
Clerk. C. W. Calbreath, Deputy. [198]

*In the District Court of the United States, in and for
the Northern District of California, First Division.*

No. 15,522.

IN ADMIRALTY.

THE UNITED STATES OF AMERICA,

vs.

The Gasoline Launch "CALYPSO," Her Boats,
Tackle, Apparel, Furniture and Cargo.

Opinion and Order to Enter a Decree Condemning the Interest of Pettenger Only, and Such Interest to be Sold Free of Encumbrance or Lien.

John W. Preston, Esq., United States Attorney and Walter E. Hettman, Esq., Assistant United States Attorney, Attorneys for the Plaintiff.

Lloyd, Cheney & Geibel, Proctors for Claimants.

The gasoline screw steamer "Calypso" was seized in Monterey Bay, while engaged in unlawfully smuggling into this country certain Chinese not entitled to admission. This action is brought to have the vessel condemned in accordance with Section 10 of the Chinese Exclusion Act, which is as follows:

"Section 10. That every vessel whose master shall knowingly violate any of the provisions of this act shall be deemed forfeited to the United States, and shall be liable to seizure and condemnation in any district of the United States into which such vessel may enter or in which she may be found."

The undisputed facts are as follows:

The "Calypso" is jointly owned by Wm. L. Sassman and Morris Pettenger, the former owning a five-sixths and the latter a one-sixth interest. Wm. H. Singleton is a creditor who is, by agreement with the owners, entitled to a mortgage upon said vessel for [199] \$3,400.00 and Los Angeles Creamery Company is also a creditor holding mortgages thereon aggregating \$760.00. Sassman has put into the boat \$5,000.00, and Pettenger \$1,000.00, in addition to the \$3,400.00, secured by Singleton and about \$800 advanced by Los Angeles Creamery Company, making

the cost of the boat something over \$10,000.00. On May 22d, 1913, Sassman was regularly enrolled by the Collector of the Port of Los Angeles as Master of the "Calypso," and thereafter with the knowledge and consent of Sassman, Oren H. Dickason was enrolled as master on July 2d, 1913, Ralph L. Lopes on July 15th, 1913, and James H. Castle on September 13th, 1913. On November 24th, 1913, Pettenger without the knowledge or consent of Sassman procured himself to be enrolled as master in lieu of James H. Castle, and was so enrolled on the ship's papers at the time of the contraband voyage out of which this action arose. In December of that year certain creditors of Sassman and Pettenger were pressing for payment, and Sassman arranged a meeting with them for December 23d, and requested Pettenger to attend. While Sassman was endeavoring to satisfy the creditors in some way, and indeed while he was arranging with Singleton for the endorsement of notes—which finally did satisfy them, instead of attending this meeting Pettenger, without Sassman's knowledge, took the boat from Los Angeles to San Diego, the purpose of his voyage being to secure a load of contraband Chinese to smuggle into the United States, but as stated by the witnesses, on this voyage "he failed to make connections." After his return from San Diego, and upon December 26th, 1914, Pettenger entered into a written agreement with Sassman as follows:

"Amendment to Articles of Agreement made August 10th, 1912, for the 'Calypso,' between Wm. L.

Sassman and Morris Pettenger, both of Los Angeles, California. [200]

“This agreement made this twenty-third day of December, 1913, in consideration that Wm. H. Singleton agrees to pay promissory notes to the amount of \$3,400.00, which amount clears the indebtedness of the ‘Calypso.’ I, Wm. L. Sassman, and I, Morris Pettenger agrees to give said Wm. H. Singleton a mortgage on the ‘Calypso’ for the amount of \$3,400.00 with interest at 8% and deliver to Wm. H. Singleton the insurance policy which amounts to \$5,000.00, and further, that I, Morris Pettenger agrees to make no contracts or take the ‘Calypso’ out on any trip without a permit from Wm. L. Sassman, also that I, Morris Pettenger agrees to borrow no money or give any personal note at any time on the ‘Calypso.’ It is also agreed that I, Morris Pettenger, shall not employ a crew without a permit from Wm. L. Sassman, and under no circumstances shall the ship’s papers be transferred to anyone except by Wm. L. Sassman.

WM. L. SASSMAN,

MORRIS PETTENDER.

Witnessed by Louise E. Grimaud.”

On January 2d, 1914, Pettenger accompanied by Fred Fox, Will Fox, David Main and a Chinaman named Lee took the “Calypso” out on the trip which resulted in her seizure. They went to Mexico, took on board a number of Chinese who were not entitled to enter the United States and about January 16th, secretly landed them at Monterey, at which time and place the “Calypso” was seized by the officers of the

United States. The "Calypso" is therefore liable to condemnation in this proceeding, if Pettenger were her master within the meaning of the law. The disputed facts that are material are as follows:

Pettenger testified that about a week after his enrollment as master of the "Calypso," he informed Sassman of the fact of such enrollment; and that on December 26th, 1913, and about an hour after [201] the execution of the agreement above set forth he had a conversation with Sassman which he details as follows:

"It was on the 26th of December; I was in the City, and I saw Mr. Sassman, and I told him that Fox had a proposition on for Mexico, and he wanted—we did not go into the details of it,—he wanted to know if there was any money in it; I says 'yes.' I had already told him I had signed as master of the ship. There was not anything mentioned at that time whose name was on the ship's papers. I did not tell him what Fox's proposition was. I told him there was a chance proposition, and asked him if he wanted to go down and talk to Fox about it. He says 'No, you go ahead,' he says, 'and take the boat.' Fox was not employed, he was a partner. Sassman did not want to go. He proposed I should go. I says, 'Are you willing to put your interest in the boat up against my liberty?' He says, 'Yes, go ahead and use the boat and get some money in.' "

That he had been informed or had learned that Pettenger was enrolled as master of the "Calypso" is vigorously denied by Sassman, as is also the fact that any such conversation occurred as is detailed above.

There is no doubt that Pettenger procured his enrollment as master without the knowledge or consent of Sassman, nor is there any doubt that the agreement by the terms of which Pettenger was not to take the "Calypso" out on any trip without a permit from Sassman was executed on December 26th. There is also no doubt that a few days prior thereto, and without the knowledge or consent of Sassman, Pettenger made the trip to San Diego in an endeavor to secure a load of contraband Chinese, at the very time that Sassman was endeavoring to arrange a settlement with their creditors. Sassman is a working man, long employed by the Los Angeles Creamery Company, as a driver and collector, whose hours of work are from midnight until seven or eight A. M., and all of [202] whose earnings for a number of years have gone into the "Calypso."

The testimony of Pettenger, if true, as to the conversation above set forth, and as to his informing Sassman of his enrollment as master of the "Calypso," is sufficient to establish the fact that he was master within the meaning of the law, at the time that the vessel was seized. But if Sassman had no knowledge of Pettenger's enrollment as master, and if after the execution of the agreement of December 26th, Pettenger took the "Calypso" upon the trip which resulted in her seizure, without Sassman's knowledge or consent, and contrary to the express terms of such agreement, Pettenger, although actually in charge of the "Calypso" was not her master in any sense that would authorize the court to condemn Sassman's interest in her, even though his own

interest be subject to condemnation in this proceeding. For Sassman having a five-sixths interest in the "Calypso" was entitled to name her master, and control her movements, and this right he could exercise against the wishes of Pettenger who owned but a one-sixth interest. The question at issue then narrows itself into a question of veracity as between Sassman and Pettenger. The testimony of Pettenger detailed above was given before the Commissioner on April 27th, at which time he testified that the conversation with Sassman occurred in the barnyard of the Los Angeles Creamery Company, on December 26th, and about an hour after the agreement had been signed. In a deposition sworn to by him in Los Angeles on April 9th he testified that after signing the agreement and before the "Calypso" was seized he had not seen Sassman. Both of these statements cannot be true.

To warrant a decree forfeiting Sassman's interest in the "Calypso" the testimony of Pettenger must be accorded full credit, and that of Sassman disregarded. But all the circumstances seem to [203] me to corroborate Sassman rather than Pettenger. Although Sassman had the absolute right to name the master, Pettenger had without his knowledge or consent procured his own enrollment as such, and had also without Sassman's knowledge and against his will made the San Diego trip, which had an unlawful purpose in view, and had upon his return signed the agreement that he would not without Sassman's consent take the boat out, contract any bills, or hire a crew and I cannot give sufficient cre-

dence to his statement that within an hour after the execution of this agreement, made alike for the protection of Sassman and the creditors, he secured Sassman's assent to the use of the vessel in an illegal enterprise, to base upon such statement a decree the effect of which might be to deprive an innocent person of the fruits of years of labor.

The finding of the court will be that on the trip in question Pettenger was again acting without the knowledge and against the will of Sassman; that Sassman had no knowledge of his enrollment as master; that as against Sassman, he was not such master within the meaning of the law, and that consequently the interest of Sassman cannot be condemned.

A decree will be entered condemning the interest of Pettenger only, and such interest will be sold free of encumbrance or lien.

September 30th, 1914.

M. T. DOOLING,

Judge.

NOTE.—The name Sassman wherever it occurs should read Sassaman.

[Endorsed]: Filed Sep. 30, 1914. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [204]

*In the District Court of the United States, in and for
the Northern District of California, First Division.*

IN ADMIRALTY.—No. 15,522.

UNITED STATES OF AMERICA,

vs.

The Gasoline Launch "CALYPSO," Her Boats,
Tackle, Apparel, Furniture and Cargo.

Final Decree of Forfeiture on a Libel of Information.

The monition issued in this cause having been heretofore filed, and the usual proclamation having been made, the default of all persons except the claimants and intervenors Wm. L. Sassman and Wm. H. Singleton who jointly filed an answer to the libel of information; and

WHEREAS the matter was referred to Francis Krull, United States Commissioner for the Northern District of California to take testimony and report his findings of fact to the above-entitled court; and

WHEREAS, from said findings of fact of said Commissioner and from the brief of the libellant, the claimants and the intervenors duly filed with this court together with all the records, exhibits and pleadings submitted, it is hereby determined and decreed that the said gasoline launch "Calypso" did, on the 16th day of January, 1914, at Monterey in the State and Northern District of California, land certain alien Chinese in violation of the Chinese Exclusion Laws and Regulations, and that Morris Pet-

tenger was the person in charge of the said vessel, and

WHEREAS the said Wm. L. Sassman on said date owned an undivided five-sixths interest and the said Morris Penniger owned an undivided one-sixth interest in said vessel; and [205]

WHEREAS the said Morris Pettinger on January 16th, 1914, was not the duly authorized and legally acting master of said vessel, but was serving in the capacity of master without the knowledge and against the will of the part owner, Wm. L. Sassman;

NOW, THEREFORE, by reason of the premises, it is hereby ordered, adjudged and decreed that the undivided one-sixth interest of said Morris Pettinger be condemned and forfeited to the government of the United States, and sold free of any encumbrance or lien, but that the interest of Wm. L. Sassman be not condemned.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the sale at public auction of the said one-sixth interest in the said gasoline launch "Calypso" above mentioned, now at Angel Island in the Bay of San Francisco, State and Northern District of California, be made at the door of the United States Courthouse and Postoffice Building in the City and County of San Francisco, State and District aforesaid, on the 13th day of October, 1914, at the hour of ten o'clock A. M.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the notice of the said sale be published in "The Recorder," a newspaper most

likely to give full and complete notice of said sale, the notice to appear every day of publication beginning on or about October 5th, 1914, to and including the ninth day of October, 1914, and to that end it is ordered and decreed that the clerk of this court issue a decree *venditioni exponas* to the said United States Marshal, returnable in accordance with the rules and practice of this court, and upon the date above set.

M. T. DOOLING,

Dated October 3d, 1914.

United States District Judge.

[Endorsed]: Filed Oct. 3, 1914. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [206]

In the District Court of the United States, in and for the Northern District of California, First Division.

IN ADMIRALTY.—No. 15,522.

UNITED STATES OF AMERICA,

vs.

The Gasoline Launch "CALYPSO," Her Boats, Tackle, etc.

Temporary Restraining Order.

Good cause appearing therefor, and upon motion of Walter E. Hettman, assistant United States Attorney,

IT IS HEREBY ORDERED in the above-entitled cause that the gasoline launch "Calypso," an undivided one-sixth interest in which has been forfeited, condemned, and sold by a decree of the above-

entitled court, be held in its present custody and that the said boat be not removed from the present mooring pending the determination of a petition for an appeal from the decree in the above-entitled cause in the matter of the undivided five-sixths interest in said boat.

Dated October 14, 1914.

M. T. DOOLING,
United States District Judge.

Return on Service of Writ.

United States of America,
Northern District of California,—ss.

I hereby certify and return that I served the annexed Temporary Restraining Order on W. L. Sassman by handing to and leaving a true and correct copy thereof with said W. L. Sassman personally at San Francisco in said District on the 15th day of October, A. D. 1914.

J. B. HOLOHAN,
U. S. Marshal.
By C. B. Delaney,
Deputy. [207]

[Endorsed]: Filed Oct. 22, 1914. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [208]

*In the District Court of the United States, in and for
the Northern District of California, First Division.*

IN ADMIRALTY—No. 15,522.

THE UNITED STATES OF AMERICA

vs.

The Gasoline Launch "CALYPSO," Her Boats,
Tackle, etc.

Order Modifying Temporary Restraining Order.

The verified petition of claimant, William L. Sassaman, having been filed herein praying this Court to vacate its temporary restraining order signed and filed herein October 14, 1914, and said matter having been this day presented to the Court and argued by Warren E. Lloyd, Esq., attorney for petitioner, and by John W. Preston, Esq., United States Attorney.

IT IS ORDERED that said order filed herein October 14, 1914, requiring the gasoline launch "Calypso" to "be held in its present custody and that the said boat be not removed from the present mooring, pending the determination of a petition for an appeal from the decree in the above-entitled cause, in the matter of the undivided five-sixth interest in said boat" be, and the same is hereby vacated and set aside;

IT IS FURTHER ORDERED that pending the final determination of this cause in whatever court it may be prosecuted, possession of said five-sixth interest in said boat be and the same is hereby

awarded to petitioner, William L. Sassaman.

IT IS FURTHER ORDEDED that in consideration of the said revocation of said order, that said William L. Sassaman do not sell, encumber or otherwise dispose of the undivided five-sixths interest in said "Calypso" awarded to him as claimant herein, pending the determination of a petition for an appeal from the decree in the above-entitled cause as to said undivided five-sixths interest to [209] abide the outcome of said appeal and the execution of the judgment or decree herein and to deliver the same within the jurisdiction of this Court or the Circuit Court of Appeals for such purpose should judgment of sale be finally ordered against said five-sixths interest and that, meanwhile, said William L. Sassaman, his agents and employees, be permitted to utilize said boat and operate the same, in or out of, and from any Pacific Coast points or ports of the United States, subject to no penalty hereunder as to wear and tear upon said vessel, her boats, tackle, apparel, furniture or appurtenances, or damage by the elements.

An exception is ordered reserved to petitioner and all claimants and intervenors herein to this order, and to the jurisdiction of the Court to make the same, except as to that portion hereof vacating the order filed herein October 14, 1914.

Dated October 15th, 1914.

M. T. DOOLING,
United States District Judge.

[Endorsed]: Filed Oct, 15th, 1914. W. B. Maling,
Clerk. By Lyle S. Morris, Deputy. [210]

*In the District Court of the United States, in and for
the Northern District of California, First Division.*

IN ADMIRALTY—No. 15,522.

THE UNITED STATES OF AMERICA

vs.

The Gasoline Launch "CALYPSO," Her Boats,
Tackle, Apparel, Furniture and Cargo.

Order Regarding Withdrawal of Exhibits.

It appearing to the Court that a decree has been entered herein, forfeiting to the United States, and ordering the sale of, the one-sixth interest in the "Calypso," her boats, tackle, apparel, furniture and cargo, heretofore owned by Morris Pettenger, and freeing and releasing the undivided five-sixth interest in said "Calypso" owned by William L. Sassaman; and

It further appearing that said William L. Sassaman has purchased at sale by the United States Marshal the said one-sixth interest of Morris Pettenger, hereinabove mentioned, and received the Marshal's deed therefor, it is

ORDERED, ADJUDGED AND DECREED that said William L. Sassaman or Messrs. Lloyd, Cheney & Giebel, his proctors in admiralty, be permitted to withdraw from the files of the clerk herein the following papers and documents, being appurtenant to said vessel, namely: Libelant's Exhibit No. 1, being the license to William L. Sassaman. Libelant's Exhibit No. 3, being the consolidated enrollment and license of said "Calypso." And the clerk of this Court is

hereby ORDERED to deliver said exhibits and instruments to Messrs. Lloyd, Cheney & Geibel or William L. Sassaman, upon receiving a receipt therefor.

Dated October 13th, 1914.

WM. W. MORROW,
Judge.

Oct. 13/14.

Received Exhibits 1 and 3 above mentioned.

LLOYD, CHENEY & GEIBEL,
Proctors for Claimants. [211]

[Endorsed]: Filed Oct. 13, 1914. W. B. Maling,
Clerk. By Lyle S. Morris, Deputy Clerk. [212]

*In the District Court of the United States, in and for
the Northern District of California, First Division.*

No. 15,522.

UNITED STATES OF AMERICA

vs.

The Gasoline Launch "CALYPSO," Her Boats,
Tackle, Apparel, Furniture and Cargo.

Notice of Appeal.

To Messrs. Lloyd, Cheney & Geibel, Proctors for
Wm. L. Sassaman, claimant of the gasoline
launch "Calypso," and

To Lyle Morris, Clerk of the District Court of the
United States in and for the Northern District
of California, First Division:

You and each of you will please take notice that the
United States of America, libellant in the above-en-

titled cause, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from that portion of the final decree of the District Court of the United States for the Northern District of California entered in said cause on the third day of October, 1914, which adjudged, orders and decrees that the undivided five-sixths interest of Wm. L. Sassaman in said vessel be not condemned and forfeited to the Government.

Dated October 24, 1914.

JOHN W. PRESTON,
United States Attorney.

WALTER E. HETTMAN,
Assistant United States Attorney.

Service of the within Notice of Appeal by copy admitted this 26 day of Oct. 1912.

BLACK & CLARK,
LLOYD, CHENEY & GEIBEL,
Attorneys for Appellees.

[Endorsed]: Filed Nov. 2, 1914. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [213]

*In the District Court of the United States, in and for
the Northern District of California, First Division.*

No. 15,522.

UNITED STATES OF AMERICA

vs.

The Gasoline Launch "CALYPSO," Her Boats,
Tackle, Apparel, Furniture and Cargo.

Assignment of Errors.

The libelant herein, the United States of America, hereby assigns errors in the proceedings of the District Court as follows:

I. That the Court erred in not decreeing the condemnation and forfeiture of all interests in the gasoline launch "Calypso" in accordance with Section 10 of the laws relating to the admission of Chinese, the Act of May 6, 1882, as amended by the Act of July 5, 1884.

II. That the Court erred in releasing the undivided five-sixths interest of Wm. L. Sassaman in said vessel and condemning and ordering forfeited the undivided one-sixth interest of Morris Pettinger.

III. That the Court erred in finding that Morris Pettinger, the owner of an undivided one-sixth interest in said vessel, was not the duly qualified and acting master of said vessel on January 16th, 1914.

IV. That the Court erred in holding that on the 16th day of January, 1914, Pettinger was acting as Master without the knowledge and against the will of the said Wm. L. Sassaman.

V. That the Court erred in finding that said Wm. L. Sassaman had no knowledge of the enrollment of said Morris Pettinger as master of said vessel.

VI. That the Court erred in disregarding the testimony of said [214] Morris Pettinger in which he claimed to be the lawful and duly qualified master of the said vessel on January 16th, 1914.

VII. That the Court erred in giving credence to the testimony of said Wm. L. Sassaman to the effect

that he did not know of the enrollment of Morris Pettinger as master of said vessel.

VIII. That the Court erred in not holding that the said Wm. L. Sassaman had knowledge that the said Morris Pettinger was acting as master of the said vessel on January 16th, 1914.

IX. That the Court erred in holding that Morris Pettinger was not, on January 16th, 1914, the master of the said vessel within the meaning of the above mentioned law.

X. That the Court erred in holding that the undivided five-sixths interest of said Wm. L. Sassaman should not be condemned and forfeited.

San Francisco, Oct. 24, 1914.

JOHN W. PRESTON,

United States Attorney.

WALTER E. HETTMAN,

Asst. United States Attorney.

Service of the within Assignment of Errors by copy admitted this 26 day of Oct., 1914.

BLACK & CLARK,

LLOYD, CHENEY & GEIBEL,

Attorneys for Appellees.

[Endorsed]: Filed Nov. 2, 1914. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [215]

*In the District Court of the United States, in and for
the Northern District of California, First Division.*

No. 15,522.

UNITED STATES OF AMERICA

vs.

The Gasoline Launch "CALYPSO," Her Boats,
Tackle, Apparel, Furniture and Cargo.

Stipulation and Order Concerning Original Exhibits.

It is hereby stipulated and agreed between the proctors for the respective parties hereunto that all the exhibits introduced in evidence at the hearing in the above-entitled cause before the above court and all the exhibits introduced in evidence before U. S. Commissioner Krull, may be detached from the depositions taken before the Commissioner and may be omitted from the Apostles on Appeal in said cause and may be filed in the United States Circuit Court of Appeals for the Ninth Circuit in the original form in which the same were respectively introduced before said court and said Commissioner.

Dated October 24, 1914.

JOHN W. PRESTON,

United States Attorney.

WALTER E. HETTMAN,

Asst. United States Attorney, Proctors for Appellant.

BLACK & CLARK,

LLOYD, CHENEY & GEIBEL,

Proctors for Appellees.

It is so ordered. Dated Oct. 5th, 1914.

M. T. DOOLING,
U. S. District Judge.

Service of the within Stipulation by copy admitted
this 26 day of Oct., 1914.

BLACK & CLARK,
LLOYD, CHENEY & GEIBEL,
Attorneys for Appellees.

[Endorsed]: Filed Nov. 5, 1914. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [216]

*In the District Court of the United States, in and for
the Northern District of California, First Divi-
sion.*

No. 15,522.

UNITED STATES OF AMERICA

vs.

The Gasoline Launch "CALYPSO," Her Boats,
Tackle, Furniture, Apparel, and Cargo.

**Order Extending Time to File Apostles on Appeal in
the Circuit Court of Appeals.**

Good cause appearing therefor, and it appearing
to the Court that further time is necessary in which
to perfect and prepare the apostles on appeal to the
Circuit Court of Appeals in the above-entitled cause,
it is hereby ordered that the appellant may have to
and including January 10, 1915, in which to file and
docket said appeals in the Circuit Court of Appeals.

M. T. DOOLING,
U. S. District Judge.

Dated December 18, 1914.

[Endorsed]: Filed Dec. 18, 1914. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [217]

Certificate of Clerk to Apostles on Appeal.

I, W. B. Maling, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing and hereunto annexed 217 pages, numbered from 1 to 217, inclusive, with the accompanying exhibits, 6 in number (transmitted separately in their original form), contain a full, true and correct transcript of the records and proceedings as the same now remain on file and of record in the office of the Clerk of said District Court, in the cause entitled *The United States of America vs. The Gasoline Launch "Calypso,"* Her boats, tackle, etc., number 15,522, and which said Apostles on Appeal are made up pursuant to and in accordance with "Praecipe for Record on Appeal" (copy of which is embodied herein) and the instructions of Proctor for Libellant and Appellant herein.

I further certify that the cost for preparing and certifying the foregoing Apostles on Appeal is the sum of One Hundred Sixteen Dollars and Eighty Cents (\$116.80).

IN WITNESS WHEREOF, I have hereunto set my hand and the seal of said District Court this 4th day of January, A. D. 1915.

[Seal]

W. B. MALING,
Clerk.

By C. W. Calbreath,
Deputy Clerk. [218]

CMT.

[Endorsed]: No. 2545. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. William L. Sassaman, Claimant of the Gasoline Launch "Calypso," Her Boats, Tackle, Apparel, Furniture and Cargo, Appellee. Apostles. Upon Appeal from the United States District Court for the Northern District of California, First Division.

Filed January 4, 1915.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

*In the United States Circuit Court of Appeals, for
the Ninth Circuit.*

No. 2545.

UNITED STATES OF AMERICA,

Appellant,

vs.

WM. L. SASSAMAN, Claimant, etc.,

Appellee.

**Stipulation Omitting Original Exhibits from Printed
Transcript.**

It is hereby stipulated by and between the respective parties hereto that the original exhibits heretofore transmitted by the Clerk of the District Court in and for the Northern District of California, pursuant to an order of the said District Court, be omitted from the printed transcript of the record.

Dated January 20, 1915.

JOHN W. PRESTON,

United States Attorney,

WALTER E. HETTMAN,

Assistant U. S. Attorney,

Attorneys for Appellant.

BLACK & CLARK,

LLÖYD, CHENEY & GEIBEL,

Attorneys for Appellee.

[Endorsed]: No. 2545. In the Circuit Court of Appeals of the United States for the Ninth Circuit. United States of America, Appellant, vs. Wm. L. Sassaman. Stipulation Omitting Original Exhibits from Printed Transcript. Filed Feb. 1, 1915. F. D. Monckton, Clerk.

In the
United States Circuit Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA,	}
<i>Appellant,</i>	
VS.	
WILLIAM L. SASSAMAN, Claimant of the Gasoline Launch "CALYPSO," her boats, tackle, apparel, furniture and cargo,	}
<i>Appellee.</i>	

OPENING BRIEF OF APPELLANT.

JOHN W. PRESTON,
United States Attorney,
Proctor for Appellant.

Filed this.....day of August, 1915.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

No. 2545

In the
United States Circuit Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,
vs.

WILLIAM L. SASSAMAN, Claimant of the
Gasoline Launch "CALYPSO," her boats,
tackle, apparel, furniture and cargo,
Appellee.

OPENING BRIEF OF APPELLANT.

STATEMENT.

This is an action in admiralty by the Government, praying a forfeiture of the gasoline launch "Calypso," her boats, tackle, apparel, furniture and cargo.

William L. Sassaman appeared and claimed a five-sixths interest in the vessel, and certain mortgagees likewise appeared by same counsel as intervenors.

The forfeiture is claimed under Section 10 of an Act of Congress commonly known as the Chinese Exclusion Act, being the Act of May 6th, 1882, as amended July 5th, 1884 (22 Stat. 58; 23 Stat. 115).

The undisputed facts are:

That the boat was seized in Monterey Bay on January 17th, 1914, while the boat was then actually engaged in unlawfully smuggling into the United States certain Chinese not entitled to admission.

The boat was manned and controlled at the time of seizure by Morris Pettenger, a part owner in the boat, as well as a partner in its operation.

The illegality of the acts of the boat are undisputed. Likewise it is uncontroverted that the said Pettenger actually was the master of the boat at the time of seizure.

It is also undisputed that he was the enrolled master of the boat.

He was also the only licensed engineer the boat ever had from the time of its launching in May, 1913, until its seizure some nine months afterward.

The issue raised by the claimant is that the acts of Pettenger were unauthorized and fraudulent as to him, and that he could not in law, be the master of the boat. This brings us to the question of master-ship of the boat.

FACTS.

FIRST: The boat was constructed under a preliminary agreement dated August 10th, 1912. (Trans., p. 119, and Claimant's Exhibit "A.")

The terms of this preliminary agreement required that Pettenger put up one-third, and claimant Sassaman two-thirds, of the cost of the boat. The investment was then to be equalized and the parties were then to own each an undivided one-half interest in the boat. This agreement was *modified*, but not *abrogated*.

It is true that when the boat was launched, the interests were specified to be one-sixth and five-sixths respectively, but the agreement to operate upon a basis of equal profits remained, as also the agreement to equalize the amount invested.

As evidence of these facts, the original agreement was simply amended by the alleged new contract of December 23rd, 1913. Also Pettenger signed all obligations, such as mortgages, and notes, and was equally bound for their payment. Sassaman admits this:

Q. This \$3,400, is it on this boat?

A. The mortgage and Mr. Singleton's claim.

Q. \$3,400 of Singleton's, and how much is the mortgage?

A. I think there is a mortgage for \$425.

Q. How much, all told, over \$4,000?

A. Yes, sir.

Q. Is Pettenger equally liable with you on all this obligation? A. He is on that.

Q. He signed all the notes and mortgages?

A. He had to.

Q. He signed this agreement you made there with regard to Singleton? A. Yes, sir.

Q. And you are doing work for a creamery company now? A. I had been, yes.

Q. This indebtedness is represented by the joint obligation of you and Pettenger?

A. Yes, sir.

Q. How much of it was the agreement between you that Pettenger should pay?

A. We would pay this money as we got it.

Q. Out of the earning of the boat?

A. Yes, sir; and I was paying whatever I could.

Q. What was the understanding; you claimed 5/6ths?

A. I handled the money and I paid off whatever money I got. I paid this off as I got the money in. Pettenger got no money except what he needed to live on.

Q. For running the boat? A. Engineer.

Q. As the proceeds would come in they were to go to discharge these obligations?

A. Yes, sir.

Q. When the obligations were paid, what would be the ownership; what proportion of ownership?

A. He would get his proportion.

Q. How much? A. Whatever we made.

Q. Suppose that indebtedness has been paid for by the earnings of the boat, what would have been the interest of Pettenger in the boat?

A. The same interest.

Q. Equal interest with you?

A. Not unless he paid the back money, that would equalize the partnership.

Q. You mean you got 5/6ths and he got 1/6th?

A. If he worked with me I would give him one-half.

Q. He was to have one-half after it was paid up? A. Yes, sir.

Q. He was to give his time for his actual running expenses? A. Yes, sir.

Q. And after the thing was all paid up half the proceeds would be his and half would be yours? A. Yes, sir.

(Trans., pp. 129-130).

Pettenger in this behalf says:

Q. In the matter of profits, you had had some understanding late in the year 1913 along in November or some time about dividing the profits?

A. Yes, sir.

Q. Just what was that agreement?

A. I was to share half of the profits.

Q. That agreement was in writing?

A. Yes, sir.

(Trans., p. 155).

From the above it is clear that the parties were equal partners in the operation of the boat. Pettenger was putting in his time, taking only living expenses, and all the proceeds of the operation of the boat were to go to discharge the indebtedness against her, and then the profits were to be divided equally, and this was true whether Pettenger increased his interest in the boat or not.

SECOND: When the boat was launched, Pettenger became her licensed engineer and remained with her continuously from this date, which was May 22nd, 1913, until her seizure, January 17th, 1914. (Trans., pp. 150, 151. See Exhibit 2).

Sassaman on May 22nd, 1913, became the enrolled master of the boat. (Trans., p. 189 and Exhibit 3). The two men operated the boat as a passenger vessel, and there never was any agreement, verbal or written, to discontinue this use of her.

On July 2nd, 1913, Sassaman surrendered the mastership of this boat to one Oren H. Dickason, and he was not at any time thereafter the enrolled master of the boat. The mastership was transferred from Dickason to Lopez July 15th, 1913. On September 13th, 1913, one Castle received the license. (Trans., pp. 189-190). This man Castle was only hired by the trip and left in a very few days. Fox testified about Castle as follows:

Q. Do you know a man named Castle?

A. I do.

Q. What was he?

A. He was captain of the boat for two or three days only.

Q. What became of him?

A. He has gone to Great Falls, Montana.

Q. Do you know who procured him to become captain of this boat?

A. I could not say as to that.

Q. He was only there for a few days?

A. I think so.

(Trans., p. 110).

Sassaman knew, of course, that he himself was not the enrolled master of the boat. He knew that Castle was simply hired by the trip, and that he had left the employ of the boat. This man must have left in September or October. The boat was then

engaged actively in business as claimant admits. Who, pray tell, did he think was the master of the boat?

Sassaman gave evasive and unsatisfactory answers to questions touching the mastership, and as I interpret it, he admits he was not the master of the boat and claims merely that he was the managing owner and could, if he willed it, name the master. Here is his testimony:

Q. Did you ever see this paper here introduced in evidence as U. S. Exhibit 3?

A. Yes, sir.

Q. Did you get it? A. Yes, sir.

Q. What did you do with it?

A. I put it on the boat.

Q. Who is this man here, Oren H. Dickason?

A. He was once employed in my place.

Q. Did you surrender the mastership to him. A. Yes, sir.

Q. I believe you stated that you did surrender the mastership of this vessel on July 2d, 1913, to Oren H. Dickason? A. Yes, sir.

Q. You knew, didn't you, that Mr. Dickason surrendered the mastership of the vessel to Ralph L. Lopes?

A. I was present when he surrendered it to Lopes.

Q. Were you also present when Lopes surrendered it to Castle? A. Yes, sir.

Q. Who did you think was the master of the vessel when Pettenger took it out?

A. Castle was supposed to be the master.

Q. Where is Castle?

A. He is down in San Pedro.

Q. Was Castle in your employ?

A. Yes, sir; he was.

Q. When did he go out of your employ?

A. He never went really out of my employ, as far as the papers show.

Q. When did he go off your payroll?

A. I do not know the date.

Q. About when? A. I cannot say.

Q. Was he on your payroll in October, 1913?

A. I do not know the date; I would have to look it up in my books.

Q. Do you know whether he was on your payroll in 1913 or 1914? A. 1913.

Q. Was it before or after Christmas?

A. Before.

Q. In the month of December, or before?

A. I cannot state the time; I cannot state the date; I am sworn to tell the truth; I have no dates.

Q. Give us the month. A. I cannot.

Q. Give us your best impression as to when it was.

A. That would not be the whole truth; I cannot state it.

Q. We are not asking for the whole truth.

A. I am sworn to tell the whole truth, and nothing but the truth.

The COMMISSIONER: Q. Come as near as you can to it.

A. What is the question?

MR. PRESTON: Q. Give us your best recollection as to when this man Castle went out of your employ or the employ of the owner of the "Calypso?"

A. All I can explain to you gentlemen is, Castle was employed, but he did very little work.

The COMMISSIONER: Q. Do you know when he went out of your employ?

A. He was paid for every trip he went out.

MR. LLOYD: Q. Paid by the trip?

A. Yes, sir.

MR. PRESTON: Q. When was the last trip?

A. I cannot state, unless I look it up in my book.

Q. Could it have been in the month of October?

A. It might have been.

Q. That was probably the last trip?

A. That is close; it may have been in October, the last trip.

Q. Who did you think was the master of the vessel after he quit going out in her?

A. After he quit?

Q. Yes.

A. He was still master; there was no transfer.

The COMMISSIONER: That is your conclusion.

The WITNESS: That is the record in the customhouse.

MR. PRESTON: Q. The man must have left your employ some time or other? A. Yes, sir.

Q. Who became master after he left?

A. I was master when I took her out.

Q. Are you master? A. Yes, sir.

Q. You mean you could become master, or you are master? A. I am master.

Q. I thought you said a while ago that Castle was master?

A. I could take it from him at any time as managing owner.

Q. I thought you said that Castle was the master?

A. I was at any time I preferred to be.

Q. The upshot of it is you could become master, but you had surrendered it?

A. Castle had it; I acknowledged that before.

(Trans., pp. 131-134).

**Did Sassaman Know That Ship's Papers Showed Pettenger
to Be the Master of the Vessel?**

Sassaman knew that he was not the enrolled master.

He also knew that Castle was only paid by the trip.

He also knew that Pettenger was operating the boat in the harbor for hire.

He also knew the provisions of the Motor Boat Act of June 9, 1910, 36 Stat. 463, if not Revised Statutes 4426, to the effect that the boat could not be navigated without a licensed officer.

He also knew where the ship's papers were kept. He and Pettenger each had keys to the box.

He also knew that Pettenger was using brass polish on the boat.

He also saw the boat at least twice a week.

He also knew that Pettenger had bought life rafts for the boat.

He even knew that Pettenger had placed his own license in the pilot house and had taken his (Sassaman's) to some other place in the boat.

How can this be true and he be ignorant that Pettenger was the master of record as well as in fact

of the boat? Pettenger testifies positively that he told him about it and considered that he had the right to have the change in the papers made.

Q. The last endorsement on this change of master, on the back of this certificate, is November 24th, in which you are signed up as master; taking the place of Mr. Castle. When you were signed up as master, how long had Mr. Castle been gone?

A. Possibly a week, just a few days.

Q. When you went down there, you produced this, and did you call attention to the fact that you were one-sixth owner of the boat?

A. Mr. Stoecklin knew I was. I was acquainted with him, in a business way.

Q. Was there any hesitation on the part of Mr. Stoecklin?

A. No, sir; he asked me whether I had a right to do it, and I took the oath that is required by law.

Q. Did you have a talk with Mr. Sassaman at any time later, and inform him that you were signed up as master?

A. A few days later, yes; possibly about a week.

Q. About a week later? A. Yes, sir.

Q. You told him that you were signed then as master? A. Yes, sir.

(Trans., p. 153).

Q. Affecting you or affecting the vessel. You know that when you went and had yourself entered on the ship's papers as master, that Sassaman did not know about it, don't you?

A. Sassaman?

Q. Sassaman.

A. He did not know at the time.

Q. He did not know that at the time?

A. Yes, sir; but you understand I was the manager; I believed I was acting within the

law, and had the right to transfer those papers, as I was a part owner of the boat.

(Trans., pp. 158-159).

Also, the alleged agreement contains the following language:

“It is also agreed that I, Morris Pettenger, shall not employ a crew without a permit from Wm. L. Sassaman, and under no circumstances shall the ship’s papers be transferred to anyone except *by* Wm. L. Sassaman.”

(Trans., p. 175).

from which it is easily inferred that Sassaman had not the master’s papers, and knew that Pettenger had them.

We submit that it is contrary to human reason, as well as common sense, to say that Sassaman did not know that Pettenger was using the boat and acting as its master.

Key to Sassaman’s View Point.

A careful study of Sassaman’s testimony will show a practical admission on his part that he did know that the boat was being taken out by Pettenger. I refer to Sassaman’s use of the word “trip.” He interprets this word “trip” to mean voyages outside of the harbor. The contract of December 23rd, 1913, that Sassaman says he wrote, uses this language: “* * * I, Morris Pettenger, agree to make no contracts or take the ‘Calypso’ out on any *trip* without a permit from Wm. L. Sassaman.”

(Trans., p. 175). That Sassaman interpreted the word "trip" as above, is evident from the following quotations from his own testimony:

Q. Could she have gone out before that without your instructions?

A. Only in the harbor; she could not make a trip.

Q. Did she make a trip?

A. No, sir; the creditors would not allow her.

Q. Did she? A. She did not.

Q. You know that of your own knowledge?

A. I do.

Q. She never made a trip from the time Castle went out until the 23d day of December?

A. Yes, sir.

(Trans., p. 135).

Q. The boat was taken out at other times?

A. Yes, sir.

Q. Did he ever charge anything when he took the boat out?

A. He told me that he had in the harbor.

Q. How far?

A. Simply in the harbor, within a mile or so.

Q. He got some pay?

A. He told me afterwards that he did and kept it.

Q. How much did you get? A. Nothing.

Q. How did you expect to pay the indebtedness of this boat if you were not going to run her?

A. We were waiting for Catalina to open this time.

Q. You were not going her until Catalina opened?

A. Just special parties.

Q. In October or November, you would not run her?

A. The creditors would not allow it; we were going to run her in the harbor.

(Trans., p. 137).

Pettenger's Testimony.

The whole case at bar as I view it, rests upon the proposition as to whether the circumstances admitted and the admissions of Sassaman, when coupled with the testimony of Pettenger, make out a case of forfeiture.

It is contended that Pettenger cannot be believed. It must be recalled that he was reliable enough for claimants to first take his deposition in this case. (Trans., pp. 55 to 59).

Pettenger's loyalty to Sassaman is demonstrated out of the very mouth of Sassaman, who in direct examination admits that Pettenger said to him in referring to this Chinese smuggling episode: "I took a chance to help you; I realize you did a whole lot. I took a chance to make some money to pay Singleton." (Trans., p. 186-7).

Again Sassaman says: "* * * I understand this much if I am allowed to say so, that Pettenger did try to help me out this way which he said he did." (Trans., p. 187).

Pettenger went with Sassaman to an attorney and also talked with Sassaman at his request three or four times after his arrest. Why should he perjure

himself against Sassaman? How can Sassaman in conscience call him a falsifier even to the extent of stealing? The trip, had it been successful, would have netted them \$3400.00, the exact amount of indebtedness against the boat. Would Sassaman then have claimed his part of the money? (Trans., p. 107). Why should Pettenger take a chance like this alone?

Pettenger and Sassaman both underwent a personal examination on the witness stand before the United States Commissioner. The case rested upon which one the Commissioner would credit. Pettenger like a man, told the truth and in my judgment it would be a palpable miscarriage of justice to whitewash Sassaman and condemn Pettenger, when in my sincere judgment Pettenger is the worthier of the two.

Can it be conceived that Sassaman could have kept such intimate connection with the boat and then be totally ignorant of what was going on? In broad daylight mechanics worked to change the hatchway so as to stow the necessary oil and fuel for the trip. In the open market \$115 worth of oil was purchased and prior thereto an unsuccessful effort was made to buy supplies at other places.

The Federal officer's attention was attracted, and the boat kept under surveillance for some two or three days prior to her departure. Where was Sassaman during all this time? He loudly contends he was at work. So was Pettenger. Pettenger had

given his time entirely to the boat and had also no other work. What does Pettenger say?

Q. Did you have any conversation with Mr. Sassaman about a trip to Mexico, or about any project of going to Mexico?

A. I did after Christmas.

Q. After Christmas? A. Yes, sir.

Q. Just what did you say to him, what was the nature of this conversation with Mr. Sassaman about going to Mexico?

A. It was on the 26th of December, I was in the city, and I saw Mr. Sassaman, and I told him that Fox had a proposition on for Mexico, and he wanted—we did not go into the details of it; he wanted to know if there was any money in it. I says “Yes.”

Q. You had already told him you had signed as master of the ship?

A. Yes, sir; he knew I was. There was not anything mentioned at that time whose name was on the ship's papers.

(Trans., pp. 153-154).

Q. What did you say to Mr. Sassaman about running down there? What you would do about sending the ship down there; was there anything further said?

A. He did not want to go. He proposed I should go. I says, “Are you willing to put your interest in the boat up against my liberty?” He says, “Yes.” He says, “Go ahead and use the boat and get some money in.”

Q. What I understand you to say now with reference to that, you put up your liberty against his interest?

A. That is it.

Q. Did he know, had you talked over what the object of this trip was?

A. I told him it was a chance proposition; I did not mention any Chinamen, or anything like that.

Q. He said, "Go ahead?"

A. Yes, sir; he said, "Go ahead and use the boat and get some money in."

Q. When you asked him to run the boat himself, he said, "No, you do it?"

A. Yes, sir.

Q. Is that it? A. Yes, sir.

(Trans., pp. 154-155).

Now is not this a reasonable proposition? Here was the boat in debt and no apparent way of paying it out. Of course Singleton would not consent to an illegal voyage. So isn't it perfectly natural that desiring money, and knowing the situation, Pettenger should mention it to him? Pettenger is trusted by Sassaman in these other matters, why not believe him here?

It may be said that Pettenger expected a lenient sentence for this story. Pettenger had already entered his plea of guilty. His companion had already been sentenced and what Pettenger told was with a full knowledge that his punishment would in no wise be affected by his testimony. Moreover, Pettenger had already given a deposition for Sassaman, and why did not Sassaman ask him about this question of consent so vital to his defense in this case? Pettenger told the truth, and had he told it sooner Sassaman would and should have been prosecuted. Pettenger said he was being shadowed, and did everything in his power to shield Sassaman. (Trans., pp. 164-5).

I think this Court ought to believe Pettenger and that the circumstances show that if, had he desired

to injure Sassaman, he could have done so in a thousand times more effective manner by telling the authorities in time to have prosecuted Sassaman with the others. In my judgment Sassaman is extremely fortunate that he was not indicted with the others.

But it is said that in his deposition at Los Angeles, Pettenger testified at variance with his testimony before the Commissioner in this, that he said in the one place that after signing the agreement on December 26th, 1913, he did not see Sassaman, and before the Commissioner, that he talked to Sassaman after signing the document. The witness says the conversation occurred the same day the paper was signed, and within one hour thereafter.

This in my judgment, is no contradiction. Any person perfectly truthful could give both answers. The *day* was in his mind in making the first answer, and the *time* of the day, or the number of visits on each day was not specifically called to his attention. Pettenger also testified that he was in a great hurry at the time the deposition was signed. (Trans., p. 168).

Now these are the salient facts relating to Sassaman's knowledge of what was going on, as well as his implied ratification of Pettenger's acts in using the boat. Against this is Sassaman's denial and the agreement of December 23rd or 26th, 1913. I doubt most seriously the existence of such agreement at

any time prior to the unlawful acts complained of. But assuming it to be genuine, it uses the word "trip" in a special sense, to wit, voyages outside of the harbor, thus ratifying Pettenger's use of the boat inside of the harbor, and also corroborating the fact that Sassaman must have known of the ship's papers being in Pettenger's name and lastly the contract provides for Sassaman's consent which Pettenger says he had.

And it just now occurs to me that if Sassaman was innocent, why was not Pettenger asked in his deposition when taken by Sassaman as to whether he had sought Sassaman's consent to the trip? He certainly was at all times friendly to Sassaman and anxious to shield him. Sassaman knew that he dare not ask that question, yet it was at the foundation of his whole claim and so appeared in his answer.

The Commissioner, a trained jurist, a close student of human nature, a man who sits in judgment on the credibility of witnesses, almost constantly, a man to whom all issues were referred, a man who says (Trans., p. 188) that he had examined Pettenger thoroughly and who had heard Sassaman's testimony twice orally and once by deposition, found the facts to be as follows:

That said Morris Pettenger was the master of said vessel as alleged in the libel, and that said Morris Pettenger was acting as master of said vessel and did the acts informed of in the libel at the time he was the master of said ves-

sel, and acting as such, and during all of said times informed of in the libel, the said Morris Pettenger was acting with the consent and knowledge of claimant, Wm. L. Sassaman, but without the knowledge or consent of the intervenor Wm. H. Singleton.

And in this behalf, I further find, that at the time of the voyage alleged in the libel, and at the times of the acts informed of therein, the said vessel was not stolen from Wm. L. Sassaman, or any other person, but the said vessel was, at all times during said voyage informed of in the libel, being navigated by Morris Pettenger as master thereof, with the knowledge and consent of the said claimant, Wm. L. Sassaman.

(Trans., pp. 200-201).

The trial court, without the benefit of the demeanor witnesses, found as follows:

The finding of the court will be that on the trip in question Pettenger was again acting without the knowledge and against the will of Sassaman; that Sassaman had no knowledge of his enrollment as master; that as against Sassaman, he was not such master within the meaning of the law, and that consequently the interest of Sassaman cannot be condemned.

(Trans., p. 233).

Now the final point is, what shall this Court say, who sits also in judgment on the facts?

LAW.

The statute is as follows:

“Sec. 10. That every vessel whose master shall knowingly violate any of the provisions of this act shall be deemed forfeited to the

United States, and shall be liable to seizure and condemnation in any district of the United States into which such vessel may enter or in which she may be found." 1 Fed. Stat. Anno. 782.

The power of this court in an admiralty appeal is as follows:

"Prior to the passage of the act of March 3, 1891 (26 Stat. 826, c. 517), creating the circuit court of appeals, it was well established that on an appeal in admiralty from a district court to a circuit court the cause was to be tried anew, as if no decree had been rendered. In *Yeaton v. U. S.*, 5 Cranch, 281, 283, 3 L. Ed. 101, Chief Justice Marshall said:

'The majority of this court is clearly of opinion that in admiralty cases an appeal suspends the sentence altogether, and that it is not *res adjudicata* until the final sentence of the appellate court be pronounced. The cause in the appellate court is to be heard *de novo*, as if no sentence had been passed. This has been the uniform practice, not only in cases of appeal from the district to the circuit courts of the United States, but in this court also.'

In *The Lucille*, 19 Wall. 73, 22 L. Ed. 64, the court, speaking by Mr. Justice Miller, said:

'An appeal in admiralty has the effect to supersede and vacate the decree from which it is taken. A new trial, completely and entirely new, with other testimony and other pleadings, if necessary, or if asked for, is contemplated—a new trial, in which the judgment of the court is regarded as though it had never been rendered. A new decree is to be made in the cir-

cuit court. This decree is to be enforced by the order of that court, and the record remains there. The case is not sent back to the district court for executing the decree, or for any other proceeding whatever, and that court has nothing further to do with it. The decree should therefore be complete within itself.'

In *Irvine v. The Hesper*, 122 U. S. 256, 266, 7 Sup. Ct. 1181, 30 L. Ed. 1178, Mr. Justice Blatchford, delivering the unanimous judgment of the court, said:

'The claimants not having appealed to the circuit court, it is suggested that they are liable for at least the amount awarded by the district court, and that the circuit court could not reduce that amount, but had jurisdiction, on the actual appeal, only to increase it. It is well settled, however, that an appeal in admiralty from the district court to the circuit court vacates altogether the decree of the district court, and that the case is tried *de novo* in the circuit court. We do not think that the fact that the claimants did not appeal from the decree of the district court alters the rule. When the libelants appealed, they did so in view of the rule, and took the risk of the result of a trial of the case *de novo*. The whole case was opened by their appeal, as much as it would have been if both parties had appealed, or if the appeal had been taken only by the claimants.'

See also, *The Charles Morgan*, 115 U. S. 69, 75, 5 Sup. Ct. 1172, 29 L. Ed. 316, and *The Louisville*, 154 U. S. 657, 14 Sup. Ct. 1190, 25 L. Ed. 771."

Gilchrist vs. Chicago Insurance Co., 104 Fed. 570. See also *The Nyack*, 199 Fed. 383.

Master Defined.

A definition of master is found in our Revised Statutes as follows:

“Every person having command of any vessel belonging to any citizen of the United States shall be deemed the ‘master’ thereof.”

R. S. 4612.

Of course I am in thorough accord with the construction that the word “command” is subject to the doctrine of the case of *United States vs. Wilton*, 43 Fed. 606. But it may well be observed that in that case the boat was actually stolen and all other statements in the opinion may be considered obiter dictum.

It certainly is not the law that criminal guilt on the part of Sassaman must be shown. The law clearly appears to be as stated in the case of *The Frolic*, 148 Fed. 923, as follows:

“It is well settled that under forfeiture statutes like the one in question the guilt or innocence of the owners of the property is immaterial.”

Dobbins Distillery vs. U. S., 96 U. S. 395,
24 L. Ed., 637;

U. S. vs. Stowell, 133 U. S. 1, 33 L. Ed. 555;

U. S. vs. One Black Horse, 129 Fed. 167.

I take it therefore that if Pettenger was not a trespasser on this boat that Sassaman could not

successfully resist forfeiture. And here again I emphasize the fact that Sassaman admits a limited use of the boat at least by Pettenger and also distinguishes the use of the boat in the harbor from the use of the boat in making "trips."

Now if it be admitted that the boat was being used in the harbor for hire I take it that the whole question of mastership is admitted for the law is as follows:

"All motor boats carrying passengers for hire shall carry one life-preserver of the sort prescribed by the regulations of the board of supervising inspectors for every passenger carried, and no such boat while so carrying passengers for hire shall be operated or navigated except in charge of a person DULY LICENSED for such service by the local board of inspectors."

Vol. 1 Sup. Fed. Stats. Ann. p. 40;

36 Stat. L. 463.

Sassaman knew that Pettenger was operating the boat and knew that Castle was gone and besides was only paid by the trip.

How could he be ignorant of the condition of the ship's papers?

We submit that the overwhelming preponderance of evidence is in favor of the Government and that judgment should be for the Libellant.

Motion to Dismiss Appeal.

This is an admiralty case in rem and not a criminal one and of course is appealable.

The Ben R, 134 Fed. 784.

Any further points urged in support of motion to dismiss will be replied to in our closing brief.

Respectfully submitted,

JOHN W. PRESTON,
United States Attorney,
Proctor for Appellant.

No. 2545.

IN THE
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

United States of America,

Appellant,

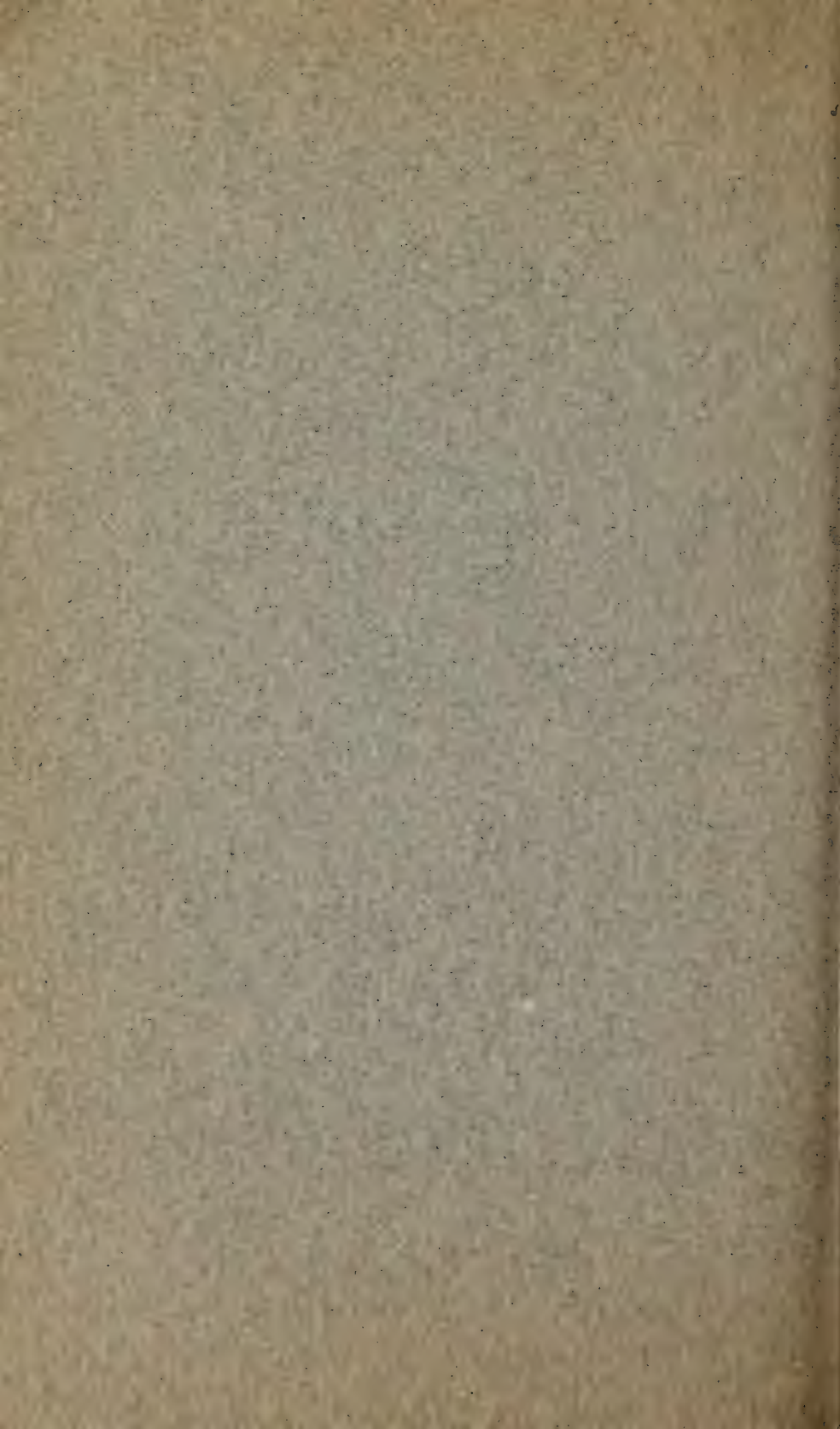
vs.

William L. Sassaman, Claimant of
the Gasoline Launch "Calypso,"
her Boats, Tackle, Apparel,
Furniture and Cargo,

Appellee.

REPLY BRIEF OF WILLIAM L. SASSAMAN, APPELLEE.

BLACK & CLARK,
948 Market Street, San Francisco, Cal.;
WARREN E. LLOYD,
906 Central Building,
Proctors for William L. Sassaman, Appellee.



No. 2545.

IN THE

United States

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FOR THE NINTH CIRCUIT.

United States of America,

Appellant,

vs.

**William L. Sassaman, Claimant of
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Furniture and Cargo,**

Appellee.

REPLY BRIEF OF WILLIAM L. SASSAMAN, APPELLEE.

STATEMENT.

This action is in admiralty, as stated by counsel for the United States, to forfeit the gasoline launch "Calypso." A decree was obtained in the District Court at San Francisco forfeiting the one-sixth interest of Morris Pettenger in the vessel and ordering the same sold "free of any encumbrance or lien" and further ordering "that the interest of William L. Sassaman be not condemned." It is against this portion of the decree freeing the five-sixths interest of Sassaman that the government appeals. In other words, the gov-

ernment adopts and executes the decree as to Pettenger and appeals as against Sassaman.

The boat was seized in Monterey Bay while engaged in smuggling Chinese into the United States. The United States attorney in his opening statement says:

“The boat was manned and controlled at the time of seizure by Morris Pettenger, a part owner in the boat, as well as a partner in its operation.

The illegality of the acts of the boat are undisputed. Likewise it is uncontroverted that the said Pettenger actually was the master of the boat at the time of seizure.

It is also undisputed that he was the enrolled master of the boat.”

The above statement, perhaps unintentionally, assumes the main questions in dispute, viz.: That at the time of the seizure Pettenger was a partner in the operation of the boat, and was actually its master. Said matters are decidedly disputed by appellee. The real question is as to who was master of the *Calypso* at time of seizure within the meaning of the Chinese Exclusion Act. Under the evidence Pettenger was not and could not be master within the meaning of said act, unless Sassaman had knowledge of the smuggling trip.

Counsel for the United States correctly says that the issue raised by the claimant is that the acts of Pettenger were unauthorized and fraudulent as to Sassaman and that Pettenger could not in law be master of the boat. This case, therefore, on the merits, has one clear-cut question as to facts and one main question as to law.

Over and above the merits, a serious question of jurisdiction is raised. The decree of October 3, 1914, ordered a sale of Pettenger's one-sixth interest and released Sassaman's five-sixths interest. No exception was taken to this decree and no order in the nature of a stay or supersedeas was made in time. On the contrary, at the government's request the decree was executed. By this action an appeal was waived and custody of the *rem* was lost.

ARGUMENT.

As to the facts, Sassaman was either up to his neck in this smuggling trip, and should have been sent to prison, or he is entirely innocent. There is no halfway ground in the matter. If Sassaman is innocent, as we contend and as the lower court has found, the main question of law is also simple. Can an owner's boat be forfeited when it was stolen or taken out without his knowledge or consent? This point of law the court has also found with us. We think both of these questions are rightly settled in Sassaman's favor.

In examining what has been decided regarding the facts, the court will see that Pettenger testified in the government's behalf that Sassaman knew of his smuggling trip. This Sassaman at all times flatly denied and every circumstance supports his testimony. On the other hand, Pettenger's testimony is contradicted by all the circumstances and by his own statement made in a prior deposition, which apparently he forgot.

Counsel for the United States makes much of the preliminary agreement claimant's Exhibit "A," stating that the agreement was modified, but not abrogated,

and remained an agreement to operate upon a basis of equal profits. This apparently is his foundation for the claim that Sassaman and Pettenger were partners. This position is untenable. The young men started out to build a boat with equal shares and to operate it as partners. Pettenger failed to keep up his end. [Tr. p. 119.] The boat became involved in debt and Sassaman stepped into the breach by making settlement with creditors through his friend Singleton and to protect Singleton tied the boat up by the new written agreement dated December 23, 1913. [Tr. pp. 55-56, p. 116.] This agreement speaks for itself. By it Pettenger, amongst other things, agreed to make no contract; not to take the Calypso out without a permit from Sassaman; not to borrow money or give a personal note on the Calypso; not to employ a crew without a permit from Sassaman; and "under no circumstances shall the ship's papers be transferred to anyone except by Wm. L. Sassaman." No possible partnership could remain after the signing of this agreement.

OWNERSHIP AND CONTROL OF VESSELS.

If two persons agree to build a ship together to be paid for and owned by them in different proportions, they are tenants in common and not partners.

Merrill v. Bartlett, 23 Mass. 46;

Thorndike v. Trustees, 23 Mass. 120;

Mitchell v. Chambers, 43 Mich. 150, 38 Am. Rep. 167;

Cinnamond v. Greenlee, 10 Mo. 578;

Croasdale v. Boyneburk, 195 Pa. St. 377, 46 A. 6.

This rule is fully recognized by the United States:

“Part owners of ships are seldom partners in the commercial sense, because no one can become the partner of another without his consent, and because if they acquire title by purchase, they usually buy distinct shares at different times, and under different conveyances, and even when they are the builders they usually make separate contributions for the purpose. Generally speaking, they are only tenants in common; * * *.

“Even where the part owners of a ship are tenants in common, the majority in interest appoint the master and control the ship, unless they have surrendered that right by agreeing in the choice of a ship’s husband as managing owner. Smith, Merc. Law, 6th Ed., 197.

“Admiralty, however, in certain cases, if no ship’s husband has been appointed, will interfere to prevent the majority from employing the ship against the will of the minority without first entering into stipulation to bring back the ship or pay the value of their shares. But the dissenting owners, in such a case, bear no part of the expenses of the voyage objected to, and are entitled to no part of the profits. Such are the general rules touching the employment and control of ships; but unless the co-owners agree in the choice of a managing owner, or the dissenting minority go into admiralty, the majority in interest control the employment of the ship and appoint the master. Maude & P. Ship., 67, 72.”

The Wm. Bagaley v. U. S., 5 Wall. 377, 18 L. Ed. 583, 589.

“The master of a ship is the person who is entrusted with the care and management of it. He

is the agent of the owner. * * * He is a special agent for navigating the vessel.”

8 Ency., U. S. Supreme Court Rep., 302.

“The trust reposed in the master of a vessel obliges him to obey the written instructions of his owners.”

Petopsco Ins. Co. v. Coulter, 3 Pet. 222, 232, 7 L. Ed. 659.

The method of appointing or removing a master is left entirely to contract. It is a question of power in the appointment or authority of agent, and revocation or termination may be by any appropriate method, with this exception: When there are co-owners, the majority in interest appoint and remove the master.

The United States has no concern as to the method adopted or who is master except as to restrictions on citizenship.

In “The Boston,” decided 1832, Fed. Cas. No. 1669, the method of appointing a master was discussed, and the questions decided remain the rule today.

The case explains that the law does not interfere in the mode of appointment of a master, further than as regards his national character, then says:

“He (the master) is, *pro hac vice*, the agent of the owner; and any mode of authorization competent to give power to one man to act for and bind another, is sufficient to constitute him master of a ship.

“The registry act of the United States requires that the name of the master shall be inserted in the register of the vessel (1 Stat. 291); that on a

change of ownership, a new register shall be taken out (*Id.* 294); and that, when the master is changed, the register shall be produced to the collector, and a report be made to him, by the owner, or the new master, of such change, whereupon the collector shall endorse a memorandum of the change on the register, and subscribe his name thereto. (*Id.* 295.) None of these provisions, however, whether complied with or not, affect the validity of the master's authority. They are only designed to secure the revenue against the allowance to foreign vessels, of privileges which only vessels belonging to citizens of the United States are entitled to enjoy."

The Boston, 3 Fed. Cas. (No. 1669) p. 921.

"The master of a vessel is appointed by her owners and is their agent."

The Donaldson, 167 U. S. 599, 42 L. Ed. 292, 295.

"Any person or body corporate having more than one-half ownership of any vessel shall have the same power to remove a master, who is also part owner of such vessel, as such majority owners have to remove a master not an owner."

U. S. Rev. Stat., Sec. 4250.

Clayton v. The Emory, 4 Fed. 342, construing U. S. Rev. Stat., Sec. 4250, holds emphatically:

"That the majority (in interest) of the owners of a vessel have the power to remove the master whether he be part owner or not, and to resume possession of her at their own pleasure;" and "that nothing but a written agreement, entitling a part

owner to possession, shall be available against the right of the majority.” (P. 345.)

The absolute right of the owners of a vessel to remove the master with or without cause, unless they have yielded that right by contract, is incontestable.

Lombard etc. v. Anderson, 67 C. C. A. 432 (4th Circuit 1914), 134 Fed. 568;

Montgomery v. Henry, 1 Dall. 50, 1 L. Ed. 32, 1 Am. Dec. 223;

Fed. Cas. No. 9, 737;

Ward v. Ruckman, 36 N. Y. 26.

The fact that a master is part owner adds nothing to his authority as master. He is simply agent of the owners as a body.

Childs v. Gladding, Fed. Cas. No. 2678.

“Who is the real owner?” and “Who is authorized master?” are questions that may always be inquired into. Registration with the collector of customs is not conclusive upon either of these points and may even not be *prima facie* evidence. The Supreme Court of California says:

“On the trial the court admitted as evidence over the objection of the plaintiffs, a copy of the register of the vessel ‘Golden Gate,’ for the purpose of showing that the plaintiffs were part owners in the said vessel. The entry in the customhouse books of the registry or transfer of a vessel is not even *prima facie* evidence as against one not claiming to be an owner, unless such entry be shown to have been made by authority of the person named in it. In Fraser v. Hopkins, 2 Taunt.

5, Lord Mansfield said, in reference to the contention that the entry was evidence against such person: 'To suppose the effect of the act to be such as is contended for would be to impute madness to the legislature.' And Hunter, J., said: 'Any bystander may put down a name in the register. You must connect the defendant with it.' And Lawrence, J., adds: 'Unless you show who is to be charged, the register cannot be made evidence even *prima facie*.'"

Moynihan v. Drobaz, 124 Cal. 213, 71 Am. St. Rep. 46.

Davidson v. Baldwin, 24 C. C. A. 453, 79 Fed. 95 (6th Circuit 1897), decided by Judges Taft, Lurton and Sage, holds that a mortgagee enrolled as owner on the ship's papers may prove that he is only mortgagee and deny liability as owner; also that a person enrolled as master may in fact not be master. The court says:

"In the case before us, it turns out that, though Reid stood on the enrollment as master, he was not acting as master when these repairs were ordered. James Murdock was actually the master controlling the navigation of the Sea Gull, and was appointed to that place by Reid. That Murdock was acting as master was known to appellants. That his name had not been inserted in the license does not affect his actual status as master, for the registry and enrollment statutes are only for the protection of the revenue, and failure to have his name inserted as master would not affect Murdock's actual authority as master. The Boston, 1

Blatchf. & H. 309, Fed. Cas. No. 1669; Steamboat Co. v. Scudder, 2 Black 385."

Davidson v. Baldwin, 24 C. C. A. 458, 79 Fed. 95.

In *The Freeman v. Buckingham*, 15 L. Ed. 342, the United States Supreme Court held that false bills of lading issued by the regular registered master without the knowledge of the owner of the vessel, cannot operate to create a lien under the maritime law binding the owner's interest in the vessel. The general owner is not estopped to show the fraudulent character of said bills of lading even in the hands of a *bona fide* holder. The court say:

"There can be no implication that the general owner consented that false pretenses of contracts having the semblance of bills of lading, should be created as instruments of fraud; or that, if so created, they should in any manner affect him or his property. They do not grow out of any employment of the vessel; and there is as little privity or connection between him, or his vessel, and such simulated bills of lading, as there would be between him and any other fraud or forgery which the master or special owner might commit."

The Freeman v. Buckingham, 15 L. Ed. 342.

From the foregoing authorities, it is clear that, without special agreement to the contrary, the owners of a boat having the majority interest control its policy, appoint and remove the master. If they do not act, there is no master. A person is master only when appointed in such way as empowers and creates him an agent.

That a person may be master without being enrolled on the ship's papers or registered on the custom-books, and not master while so enrolled or registered, is also true. The whole question is one of authority and good faith. Each case must stand on its own merits.

The contention of appellee herein is that Pettenger was never appointed master of the Calypso and never had authority to act as such. Not only that, but if he ever had been master, or ostensible master, such authority was absolutely terminated by the agreement signed by Sassaman and Pettenger dated December 23, 1913, depriving Pettenger of all right to take the Calypso out. While under this disability, Pettenger secretly took the Calypso on his smuggling trip, his object private gain. Under this state of facts, we argue there can be no forfeiture against Sassaman and the other interveners.

We are exactly within the doctrine of a case construing this very section of the Chinese Exclusion Act, decided by the U. S. District Court, of the Northern Division of the State of Washington, July, 1890, entitled *U. S. v. The Wilton*, 43 Fed. 606. We quote the case in full:

“Chinese Restriction Act—Forfeiture—Master of Vessel.

“A vessel stolen from its owner, and used while out of his control, without his knowledge or consent, in bringing Chinese laborers into the United States in violation of the law, does not for that cause become liable to seizure and forfeiture. To work a forfeiture of a vessel under the Chinese Restriction Act, the master must knowingly violate

the statute. A person in control of a stolen vessel is not master of the vessel in the sense in which the term is applied to an officer in the statutes of the United States.

(Syllabus by the court.)

“In admiralty.

“This is a case of seizure of a vessel captured while engaged in bringing Chinese laborers into the United States contrary to law, and a forfeiture is claimed on the ground that the person who had actual possession and command of the vessel was guilty of knowingly violating the statutes of the United States which prohibit such immigration.

“P. H. Winston, U. S. Atty., and P. C. Sullivan, Asst. U. S. Atty., for libelant.

“C. D. Emery for claimant.

“Hanford, J. (orally): The evidence clearly establishes that Mr. Bertram is the owner of the vessel; that the six Chinese laborers who were brought into the United States were so brought by a person unauthorized by him, who at the time had the possession of the vessel without his knowledge or consent, having in fact stolen it from him. And on this state of facts the question is whether the vessel is to be forfeited to the United States. The statute that has been cited to me contains no provision whatever for the forfeiture of a vessel. However, there is a statute found on page 504 of this same volume (25 St. U. S.) which prohibits absolutely the bringing of Chinese laborers into the United States, and provides that the duties, liabilities, penalties and forfeitures imposed and the powers conferred by the second, tenth, eleventh and twelfth sections of the act to which this is a supplement are extended to and made applicable to this act. This refers back to sections 2, 10, 11

and 12 of what is known as the "Chinese Restriction Act of 1882." That act, as amended in 1884, contains a provision for the forfeiture of a vessel as follows:

"Sec. 10. That every vessel whose master shall knowingly violate any of the provisions of this act shall be liable to seizure and condemnation in any district of the United States in which said vessel may enter, or in which she may be found.' 23 St. U. S. 117.

"It is under this provision of the statute, if at all, that the vessel is to be declared forfeited. Now this forfeiture takes place only when the master of the vessel knowingly violates the law by bringing Chinese into the United States, and landing or attempting to land them; but in this case the only persons whom it is claimed were guilty of any attempt to violate the law are persons who were trespassers and wrong-doers against the owner of the vessel. They were not put in charge of the vessel by him in the capacity of master. The vessel had no master. It cannot be claimed that a thief in possession of a vessel is the master of it. He may be in full physical, manual possession and control of it, and have power over it, until the law gets hold of him and deprives him of that power, but he is not the master of the vessel in the sense in which that title is applied to an officer of a vessel in the statutes of the United States. This case does not come within the letter or spirit of any law of the United States under which a forfeiture can be claimed, and I think, as counsel has contended here, that if Congress had made a law that would apply to this case it would be unconstitutional as depriving a person of his property without compensation, and in a case in

which no punishment or penalty could be rightfully inflicted upon him, he having violated no law. The decree will be in favor of the claimants. Counsel may prepare findings and a decree. The court will find the allegations of the libel to be true as far as they allege the bringing and attempting to land in the United States of Chinese persons, and all the affirmative allegations of the answer to be true."

United States v. The Geo. E. Wilton, 43 Federal Reporter, page 606.

The agreement which precluded Pettenger from taking the Calypso on any trip, whether as master or otherwise, is set out on pages 55-56, 116 and 229 of the transcript.

PETTENDER WAS NOT MASTER WITHIN THE MEANING
OF THE CHINESE EXCLUSION ACT.

Sassaman put in the Calypso \$5000.00 and Pettenger about \$1000.00, and the enrollment of May 22, 1913, shows them owners in that proportion. [Tr. pp. 119, 131.] About \$3400.00 of Singleton's money and \$800.00 of Los Angeles Creamery Company's money also went in the boat. [Tr. pp. 127, 32, 37.]

Pettenger was supposed by Sassaman to be engineer. [Tr. pp. 109, 123, 142, 145 and 151.]

The Calypso had three masters regularly appointed by Sassaman on the following dates:

July 2, 1913, Oren H. Dickason. [Tr. pp. 132, 151.]

July 15, 1913, Ralph L. Lopez. [Tr. pp. 132, 151.]

September 13, 1913, James H. Castle. [Tr. pp. 132, 146, 152.]

Castle was captain only two or three days and then went to Great Falls, Montana. [Tr. p. 110.] He was paid only by the trip. [Tr. p. 133.]

The boat was built at San Pedro (Port Los Angeles) for the Avalon (Catalina Island) trade and stopped work October 1, 1913, at the close of the season. [Tr. p. 133.]

During October or November the boat made a few trips to the battleship Pittsburg, gunboat Yorktown and to the old Chinese junk "Ning Po." [Tr. pp. 75, 96, 109.]

One Sunday Sassaman found Fred Fox (one of the participants in the smuggling trip) on the boat with Pettenger and exerted his (Sassaman's) authority by ordering Fox off the boat. [Tr. pp. 95, 96, 109, 135, 152.] This incident is very important, because Fox testifies of Pettenger telling him (Fox) he had gotten Sassaman's consent to let Fox go on the boat, when Pettenger's own testimony will show the contrary.

Fox testifies [Tr. pp. 95, 96] that when running out to the Chinese junk carrying passengers—about a month before the smuggling trip (which began January 3, 1913):

"Mr. Sassburg (Sassaman) here came down and asked me who I was hired by, and I says I was hired by his partner, Mr. Pettenger * * * and Mr. Sassburg he paid me off and took charge of the boat. Well, in two or three days, I don't remember how long—I was working in Warner's Machine Shop on a little boat belonging to my brother, and Pettenger came over from Long Beach and came to me and wanted me to go out with a moving picture outfit. I told

Pettenger I don't think Sassburg will like it, and I didn't want to have anything to do with Sassburg, and he says Sassburg has turned the boat over to me; he says, Sassburg has nothing to do with the running of the boat." [Tr. p. 96.]

Pettenger secretly procured his name to be entered as master on the ship's papers November 24, 1913 [Tr. pp. 120 and 121], and then shows the name to Fox as proving that he, Pettenger, had full authority to run the boat. [Tr. p. 110.] The deposition and letter of Deputy Collector of Customs Stoecklin bear this out. [Tr. pp. 53, 148.] Claimant's Exhibit "B" is as follows:

"Custom Office.

"San Pedro, Cal., March 30, 1914.

"Hon. Judge Dooling and U. S. Commissioner Krull,
United States Dist. Court, San Francisco, Cal.

"Dear Sirs: This office wishes to advise the court in the case of the 'Calypso' that Morris Pettenger appeared in this office on November 24, 1913, and represented that he was managing owner of the 'Calypso,' and secured a transfer of the ship's papers from Wm. L. Sassaman to himself. Wm. L. Sassaman was not present and he did not give consent or have any knowledge of this transfer, said Wm. L. Sassaman is managing owner and master of the Calypso,' and Morris Pettenger secured this transfer by misrepresentation.

"A. J. STOECKLIN,

"Deputy Collector."

Fox testifies that he was not present when Pettenger signed up to become master, but that Pettenger showed him "the papers that he had signed on as master of the boat," and that he said he had arranged with this

gentleman here (Sassaman) to handle and manage the boat. [Tr. p. 111.] This was before Pettenger and Fox had gone on a certain moving picture trip [Tr. p. 111] and therefore before the agreement of December 23, 1913. But Pettenger testifies in answer to the question:

“Is it not a fact that after Singleton (Sassaman) fired Fox off the boat that he never consented to his running on the boat again? A. Yes, sir, that is true.” [Tr. p. 165.]

Here we must digress a little to explain Sassaman's situation. Sassaman was then, and had been for many years, a hardworking employee of the Los Angeles Creamery Company. His hours of labor were from a little after midnight to 8 or 9 o'clock in the morning, driving a milk wagon and collecting. [Tr. pp. 66, 128.] There being only this night and early morning work (one milk delivery) Sassaman could and did frequently get down to San Pedro harbor and take the boat out. It was his pride; his life's earnings were in her. His best friends and employers were his creditors. Sassaman had no time for smuggling trips. The boat was heavily indebted and Sassaman was trying to protect his former employer, Singleton, who had come to his assistance with the finances. [Tr. pp. 117, 121, 122, 127, 130.]

While Sassaman is thus engaged and the boat is supposed to be tied up in port with instructions not to move her [Tr. p. 135], what is Pettenger doing? The very day Pettenger was secretly enrolled as master (November 24, 1913), Sassaman was writing the First

National Bank of Redlands to get a letter from it regarding the financial responsibility of Singleton which could be used in dealing with the Calypso's creditors. [Tr. pp. 69, 70.] Next, Sassaman arranges a meeting with the creditors for December 23, 1913, but Pettenger does not attend. Why? Pettenger is off on an attempted smuggling trip to San Diego. [Tr. pp. 112, 113, 114, 122.]

Pettenger testifies [Tr. pp. 57, 58]:

“Q. At the time said amendment was signed, December 26, 1913, was Wm. L. Sassaman with you? A. Yes, sir.

Q. Did he sign the same? A. Yes, sir.

Q. After signing the same and before said Calypso was seized did you see Mr. Sassaman? A. No.

Cross-examination by Mr. Archbald:

“Q. Why was this amendment referred to signed on the 26th rather than the date of its making? A. Because I was in San Diego.

Q. Were you with the boat in San Diego? A. Yes.

Q. Was Mr. Sassaman on the boat with you? A. No, sir.”

That Sassaman was not attending to the smuggling trip is evident from Inspector Blee's testimony. [Tr. p. 90.]

Sassaman testifies [Tr. p. 72]:

“Q. State whether or not you ever consented before Mr. Stoecklin, or with any United States custom officer, as to the transfer of the ship's papers of the boat ‘Calypso,’ so as to make Morris Pettenger master in

place of James K. Castle? A. I never consented. Mr. Stoecklin testified that I did not.

Q. Did you ever consent or agree with Morris Pettenger, or any person, that said Morris Pettenger might be master of said boat 'Calypso'? A. No, sir. He could not be master either, because he was no seafaring man. Mr. Pettenger had never been to sea before he went on the Calypso, and knows nothing about the sea—nothing about navigation.

Q. After Morris Pettenger signed that amendment to articles dated December 23, 1913, up to the time the Calypso was seized by the United States, did you see the Calypso? A. No, I didn't see her until April 1st, when I got to San Francisco.

Q. Did you know she was gone on any trip? A. Yes, I knew she was gone.

Q. How did you know? A. I went to Long Beach and found she wasn't in the harbor. I made four trips down there every day for four days.

Q. Did you know why she was gone? A. No, sir. * * *

Q. Had you been told that she would go? A. No, sir.

Q. Did you consent that she should go? A. No, sir.

Q. State fully and frankly whether or not after signing the amendment to the articles with Morris Pettenger, December 26, 1913, you consented or connived in any manner to said boat leaving Long Beach harbor where she was tied. A. I did not. I didn't know she was gone until I went down there and found out. I didn't know until Captain Connel told me that she left on January 3, 1914.

Q. Did you, prior to the signing of said amendment to articles, December 26, 1913, consent or agree or

connive at said boat being at any time used for illegal purposes? A. No, sir." [Tr. pp. 73, 74.]

"Q. And what, if anything, was the boat used for after November? A. Nothing.

Q. What was done with it? A. It was tied up in the inner harbor at Long Beach.

Q. When was the first knowledge you had of the enrollment and license dated November 24, 1913, substituting Morris Pettenger as master in place of James K. Castle? A. I think it was March 7th. I went to the custom house in Los Angeles and Mr. Mahar told me." [Tr. pp. 75, 76.]

A. J. Stoecklin, deputy U. S. collector of customs, testifies Sassaman was not present when Pettenger made the entry on the ship's papers. [Tr. p. 53.]

Sassaman thought Castle was enrolled as master, and that he, Sassaman, as majority owner, could appoint a new master at any time. [Tr. pp. 120, 121, 123, 127, 132, 134, 138, 143, 146, 147.]

Sassaman was so in earnest about protecting his boat and his creditors, that he drew up the supplementary agreement between him and Pettenger dated December 23, 1913 [Tr. p. 116], the day of the creditors' meeting. This was signed by Pettenger three days later after Pettenger returned from the trip to San Diego. This is a crudely drawn document, but it shows that Pettenger tied himself up and was legally prevented from taking the vessel out without Sassaman's consent. The agreement was executed in perfect good faith by Sassaman, whether or not it was so executed by Pettenger and by it Sassaman believed he had tied the boat up so Pettenger could not take her out. Pettenger

was never given authority to deviate from this situation. [Tr. pp. 117, 118, 122, 123, 124, 126.]

It is inconceivable that Sassaman, working nights, Sundays and holidays, making the difficult trip to the mountains Christmas eve, 1913, to procure the money to pay the pressing claim of the Hatfield Machinery Company [Tr. pp. 181, 182], just as victory was assured became a party to the illegal importation of Chinese, without the word "Chinese" having ever been used in conversation between him and his associates and without his ever having made any inquiry or learned any particulars of what the trip was to be or to what extent he or his property was to profit by it. In other words, Pettenger having just made a trip to San Diego and having never turned in any money for any trip to Sassaman, and having signed an agreement which prohibited his taking the boat out, considers that with a few ambiguous words he sets aside all this situation and gets authority to take the boat on voyages that will absolutely imperil its ownership. Not one word of arrangement as to what Sassaman's profit in the matter will be or as to paying the boat's debts is intimated. All that Pettenger claims to have said presupposes a complete prior understanding between him and Sassaman, while in fact he testified that there had never been at any time a conversation on the subject before or after that disputed "barnyard" talk. Pettenger's attitude regarding the boat was not such as to cause him to take the risks he did, except for personal gain. His companion, Fox, who testified before Pettenger showed up as a witness, tells the true story. Thirty-four hun-

dred dollars was to be divided equally among the smugglers. Sassaman was not mentioned in it.

“Q. Who was on board the vessel at the time you were arrested? A. Myself, Dave Mayne, Morris Pettenger. * * *

Q. Did Pettenger or your brother or anybody make a report to the officers of the United States? A. I think not. Not to my knowledge.

Q. You knew these were Chinese who had no right to come into the United States? A. I did.

Q. Did you talk it over with Pettenger? A. Yes, sir.

Q. And with Fox? A. Yes, sir.

Q. And you all knew you were trying to get Chinese into here in violation of the law? A. Yes, sir.

Q. You expected to be paid for it? A. I did.

Q. How much did you expect to get out of it? A. We expected to have \$3400.00 out of the trip. * * *

Q. How were you to divide the money? A. We were to divide it equally outside of Dave Mayne. He was paid a salary. * * *

Q. How much were you to get for the opium? A. \$3400 for the lay-out.

Q. Who agreed on the \$3400? A. I think Pettenger and Fox agreed on the \$3400.” [Tr. pp. 105-109.]

Pettenger testifies:

“Q. When you signed this amendment to this agreement on December 26, 1913, dated December 23, why did you sign it if you were intending to go off on a trip? A. I did not intend to at that time.

Q. When did this intention first come up? A. The proposition had been sprung on me, but I had not consented to go or anything of the kind.

Q. So you signed this before you consented to go?

A Yes, sir. Before I ever said anything to Sassaman about it." [Tr. p. 167.]

Yet Pettenger had already been to San Diego to get Chinese. Pettenger then testifies:

"Q. Then when did you make the arrangements as you say for taking this boat on this trip? A. That very same day. * * *

Q. At the time of signing this? A. No, sir. It was afterwards.

Q. How long afterwards? A. Oh, possibly an hour or so.

Q. Where? A. It was in the barnyard. * * *

Q. You did not mention any Chinamen did you? A. I don't believe I did.

Q. You testified awhile ago that you did not. Didn't you merely tell him it was a chance proposition? A. I believe that is about what I told him, it was a chance proposition.

Q. And you did not explain the details? A. No, sir.

Q. You are quite sure you did not explain the details? A. I am quite sure I did not.

Q. Did you tell him the Foxes were going? A. I don't believe I did.

Q. Did you tell him that Mayne was going? A. No, sir.

Q. Did you tell him about Lee? A. No, sir." [Tr. pp. 168, 169.]

Here was Pettenger signing up an agreement not to take the boat out, not even intending to take it out, according to his testimony [Tr. p. 167], and yet the fact was that he had already made one trip to San Diego to get the Chinese. He did not know of the testimony of Fox. He had forgotten his testimony at

Los Angeles. He could not foresee the questions that would be asked him on cross-examination.

Fox testifies [Tr. p. 112] that Pettenger "took the boat and went down to San Diego, I do not remember how long he stayed, about a week, with a fellow named Garibaldi, and they went after a load at that time but did not get it, and Pettenger brought the boat back." [Tr. p. 112.] They did not "make connections." [Tr. p. 113.]

Pettenger himself testifies [Tr. p. 177] that he was down at San Diego when the creditors' meeting was held.

"Q. You had gone down and made a preliminary trip to this Chinese trip, had you not? A. Yes, sir.

Q. Don't you know that while you were down there at San Diego on that trip he (Sassaman) knew nothing about it? A. That is true.

Q. He did not know a thing about it? A. That is true. I had taken the boat out on a number of occasions that he knew nothing about." [Tr. p. 177.]

If one wishes to give any credence to the evidence of Pettenger with reference to informing Sassaman of this illegal trip, it is impossible to do so without going the full extent of making Sassaman all along an associate in the deal. The contradictions in Pettenger's story compared with the straightforward story of Sassaman are insurmountable.

Fox shows that Pettenger had every motive to make him think satisfactory arrangement had been made with Sassaman. It is to be remembered that Pettenger procured his enrollment without consulting Sassaman. As a co-owner he should have consulted him. His

right to make the enrollment depended entirely on authority from Sassaman. Next, after making the enrollment, the best way of bringing it to Sassaman's attention would have been to have shown the enrollment itself. It is clear, however, that Pettenger's motive was secretly to get where he supposed he could hire whom he pleased and do what he pleased with the boat. He was already planning smuggling trips. He was already telling Fox that everything had been fixed up and that Sassaman would not again interfere with his employment; that he had seen Sassaman and everything was arranged. Why should an acknowledged master have to run the boat secretly? The day before Fox and Pettenger took the oil on, January 2, 1914, Pettenger was gone all day. He told Fox he went to Los Angeles and saw his partner there. [Tr. p. 115.] This is Fox's testimony. Now Pettenger's own testimony is that he had already spoken to Sassaman about the deal at the Creamery Company's barnyard on December 26, 1913, and that at no other time or place, or before or after, had he spoken to Sassaman about the deal. Here Pettenger was either gratuitously and unnecessarily lying to Fox, or at the time of the conversation had not arranged for the trip at all. Other circumstances show that Sassaman knew nothing of Pettenger's enrollment as master. If he knew of it, why did he as late as March 7th, 1914, go to the customs collector, Mahar, at Los Angeles, to inquire if there was an enrollment of Pettenger as master and then actually take a trip to San Pedro to find out from Stoecklin about the enrollment? These might be self-

serving acts, had they not all taken place before Pettenger testified before the commissioner and before Sassaman had any intimation that the government's position would be that he knew of the enrollment.

Counsel for the government (brief p. 17, also on p. 19) wants to know why Pettenger was not asked in his deposition when taken by Sassaman as to whether he had sought Sassaman's consent to the trip. The answer is simple. Pettenger's deposition was taken April 9, 1914. [Tr. p. 59.] Not until April 27, 1914, when Pettenger's testimony was taken before the commissioner [Tr. p. 149] did Sassaman have the least idea that anyone supposed he had anything to do with this illegal trip. A guilty party would never have put himself in the hands of the government by pressing his claim in court. In our exceptions to the report of the commissioner, we asked for the privilege of putting in additional evidence, and supported this request by affidavits. [Tr. pp. 210-226.] The district judge rightly considered the evidence sufficient without additional testimony.

If Pettenger ever got the consent of Wm. L. Sassaman for this smuggling trip it was on December 26, 1913, in a conversation in the barnyard of the Los Angeles Creamery Company, an hour or two after the signing at Attorney Bradner's office of the agreement dated December 23, 1913. Sassaman testifies he never saw Pettenger after leaving Bradner's office until after the *Calypso* was seized. Pettenger testified the same way, but evidently forgot it. Sassaman, two hours after signing an agreement to tie up the boat and

protect its creditors, did not go into a smuggling project without inquiry, without knowing the parties or money involved, and with full confidence in the judgment and ability of Pettenger, whose authority up to that moment he was trying to limit. From being cautious, prudent, putting things in writing and tying the boat up so as to eliminate Pettenger, Sassaman is supposed to have instantly put the whole boat in Pettenger's hands, and for an illegal purpose.

What happened in so short a time to change Sassaman in this way? What changed him from honesty to dishonesty; from lack of confidence in Pettenger to full confidence; and all without a motive, all without any agreement as to what profit or benefit Sassaman might get, or as to what precautions were to be taken?

Sassaman's attitude has never varied. At the close of the cross-examination by the U. S. attorney he comes out as plainly as in the beginning:

“Q. In that barnyard you heard Mr. Pettenger tell you, he came to you and he said, ‘I have a proposition to go to Mexico to make some money,’ and he says in his statement, ‘Will you put up your boat against my liberty,’ and he says you agreed to that? A. I swear in this court that I made no such statement, and that Morris did not make it to me; that he did not see me in the barnyard on the 26th day of December.

Q. Anywhere else did he say those things to you?
A. I was only five minutes in the law office.

Q. Did he make that statement? A. He did not.

Q. You emphatically deny any such statement? A. All the statements he made.” [Tr. p. 195.]

Fox's story corroborates Sassaman:

"He told me there was a Chinese that he had already connected with or could connect with. I acted as captain on the boat at times, and at times I acted as engineer; in small boats of that kind we take a turn wherever we happen to be needed. He spoke to me about this man, and wanted to get a load right away, and told me the details, and wanted me to go with him. He told me there was a Chinese that he had already connected with or could connect with, or could get a load if he went away and he wanted me to go with him. I told him I don't know nothing about it, I says, if you can see where it looks reasonable to get it through I will take a chance with you and see what we can do. Anyhow, we talked the thing over two or three times. The next thing I know my brother approached me about it and we all three talked the matter over, so then the next thing he told me was he was going to get some gasoline; the day he was going to get the gasoline I was fixing up the engine on my brother's boat; the result was, I think it was that day, he told me he could not get the oil, and he would have to see the Chinese again.

Mr. Preston: Q. That is, Pettenger would? A. Yes, sir, so then he said he was going to lay over another day and go and see Sassaman, his partner, and explain to him *thoroughly* what he was going to do; the trip he was going to make and so on.

Q. About what date was that? A. I could not tell you. I suppose it was three days possibly before we left.

Q. Before you made the trip to Mexico? A. Yes, sir, before we made the trip to Mexico." * * * [Tr. pp. 97, 98.]

“Mr. Hettman: Q. We would like to know what was said by Pettenger in the matter of the running of this ship; that is, the particular point. We would like to know what Pettenger said to you in regard to his plans as to the management of the ship? A. The day—I was going to say, when he came again he says, well, I have got everything fixed, he says, I have seen him and he is *thoroughly* satisfied and will *let us take a chance* with the boat.” * * * [Tr. p. 98.]

On cross-examination Fox testified:

“The day before we took oil Pettenger was gone all day some place. Where he was I don’t know. He told me he went to Los Angeles and saw his partner there. I don’t know where he was. I was not with him.

Q. You did not see him go either way? A. I don’t know where he went. I know he was gone.” [Tr. p. 115.]

(From the evidence of Blee [Tr. pp. 82, 88, 89] and Fox [Tr. p. 100] it is clear that the oil was taken aboard January 2, 1914, the day before the smuggling trip. According to Fox, Pettenger told him that he had been to see Sassaman the day before sailing. Pettenger says he had not seen Pettenger since December 26th.)

The portions of the evidence we have quoted are necessarily cut up and give an imperfect idea of the whole situation. The testimony of both Pettenger and Sassaman, taken before the commissioner April 27, 1914, should be read as a whole. Read as a whole, it will be seen that Sassaman was either in on this smuggling trip from the very beginning, and that the agreement dated December 23, 1913, is an unscrupulous

ruse, or said Sassaman was acting in the highest good faith, up to the moment of the purported barnyard conversation with Pettenger. Then, either Sassaman's whole characteristics and purposes instantly change, or he did not understand Pettenger, or Pettenger did not have the conversation he claims at all. The latter is unquestionably the fact. The contradictions in Pettenger's position and testimony are too many.

FORFEITURE STATUTES.

Counsel for the United States (brief p. 23) states that he is in accord with the construction given the word "command" in the case of *United States v. The Wilton*, 43 Fed. 606, but attempts to dismiss this case by saying that the boat in the Wilton case was actually stolen. The Wilton case rests on the simple proposition that if the boat was in the possession of a person who had possession without the knowledge or consent of the owner, forfeiting the boat by the government would be "unconstitutional as depriving a person of his property without compensation, and is a case in which no punishment or penalty could be rightly inflicted upon him, he having violated no law." To keep Sassaman's boat would not only be taking property without compensation, but it would be defining as a crime that which has no element of a crime in it, either express or implied. It may be that this case is not a criminal proceeding to the extent of being without an appeal (*The Ben R.*, 134 Fed 784, cited by the government), but it is certain that every statute which confiscates the property of a citizen for any act or omission to

that extent defines a crime or misdemeanor and to that extent becomes penal.

We are of course aware that plenary power is vested in the government to protect its revenues and regulate its commerce. Nevertheless, we know of no instance where a forfeiture is enforced against an innocent party unless that party is acting through an agent or has negligently or otherwise permitted his property to be used in a hazardous venture. We contend, therefore, that there is nothing in the claim of the U. S. attorney that the relation between Sassaman and Pettenger was such that it forfeits Sassaman's interest. As Judge Hanford says in said Wilton case: "The six Chinese laborers who were brought into the United States were so brought by a person unauthorized by him (the owner), who at the time had the possession of the vessel without his knowledge or consent, having in fact stolen it from him." The emphasis is on the fact of no authority, and of possession without knowledge or consent. In this Calypso case there is and could be no authority for Pettenger to take the boat out. When he did take the boat out it was without Sassaman's knowledge or consent. It was a wholly unauthorized act.

By the contract dated December 23, 1913, Pettenger agreed:

- a. "To make no contracts."
- b. "or take the Calypso out on any trip"
- c. "to borrow no money or give any personal note"
- d. "Not employ a crew"
- e. "under no circumstances shall the ship's papers be transferred to anyone except by Wm. L. Sassaman."

What could be broader in their scope than these provisions? A person honestly bound by them could not be master within the meaning of section 10 of the Chinese Exclusion Act, or at all. He would have no authority; there could be no agency whatever. An owner, tying up a boat by such a contract, would never be responsible for the fact that it was in possession of the violator of the law.

Appellee certainly does not admit any authorized use of the boat by Pettenger in the harbor for making limited trips, as suggested by counsel for the government on page 24 of his brief. The trips referred to apparently were taken long before the agreement of December 23, 1913. Said agreement was for the express purpose of putting an end to them, along with all others. There is nothing in the "motor boat" statute quoted that bears on this case.

FORFEITURE CASES ANALYZED.

There is nothing in *The Frolic*, 148 Fed. 918, and 148 Fed. 921, cited by the U. S. attorney (brief p. 23), which is decisive of our case. Nor do we think it even militates against appellee's position. White, the owner, while retaining title, gave Colby, the purchaser, possession and use of the yacht *Frolic* under an agreement of sale, and Colby then appointed Junkins master, who caused the boat to forfeit by violating section 10 of the Chinese Exclusion Act. Here was an authorized master and the boat had to forfeit. This is in line with other forfeiture cases. Any person lawfully in possession of a ship or vehicle of transportation can

cause the same to forfeit by violating a provision of the statutes regulating trade or navigation. This case of "The Frolic" was decided solely on the ground that Junkins was lawful master.

We do not deny that there is a harsh rule enforced in this Frolic case.

"White * * * agrees to allow said Colby to use the schooner yacht Frolic and to sell said Frolic to said Colby upon the terms and conditions" set forth in said contract.

"Colby will put said schooner yacht Frolic in commission * * * to use said Frolic as a party boat during the term of this contract."

"Said Colby also agrees to have personal charge of said yacht Frolic, and to keep her at all times in a condition satisfactory to said White, and shall not let said Frolic to rough or disorderly parties."

"In case said Colby shall fail to perform any part of his agreement as herein set forth, said White can then take immediate possession of said yacht Frolic, and said Colby shall immediately return her to such place as said White may designate, and shall put her out of commission."

The Frolic, 148 Fed. 918, 919.

While the rule which enforces a forfeiture in the above case is a harsh rule, it simply follows a harsh statute. The court found that Colby had authority to appoint Junkins master and that Junkins was master. Had the court found that Colby had no authority to appoint Junkins master, then the case should have been decided differently. The "Wilton" case, quoted in full by us, considers this question of authority and on that

ground decides that a thief or unauthorized person cannot cause a boat to forfeit as against an innocent owner. The Wilton case seems to be decided on principle, without citations, as many cases should be decided, although this rule of *no authority* is recognized in other cases.

In U. S. v. Two Barrels of Whiskey, 96 Fed. 483, the court quotes with approval The Lady Essex, 39 Fed. 767, saying:

“It is clear that, if the goods be stolen from the owner, or if a person has obtained possession of them fraudulently, or without authority, no act of his can forfeit them as against the true owner.”

In U. S. v. 220 Patented Machines, 99 Fed. 561, referring to said Two Barrels of Whiskey case, the court says:

“In the last case the forfeiture was refused upon the ground that the owner of the offending property was not responsible for the fact that it was in possession of the violator of the law.”

We quote the whole decision in the Frolic case, after the statement of facts:

“Brown, district judge: Upon the foregoing facts I am of the opinion that, while the title to the vessel did not pass to Colby and remained in White, Colby had such possession and control of the vessel as to authorize him to appoint E. A. Junkins as master. As it is agreed that said Junkins knowingly and in violation of the statutes landed certain Chinese persons at the port of

Providence, the schooner Frolic is subject to condemnation.”

The Frolic, 148 Fed. 918, 920.

In the case at bar it is impossible that without authority “to make contracts,” or “take the Calypso out on any trip,” or “borrow money,” or “employ a crew,” Pettenger could be master or have such “possession or control” of the vessel as to enable him to forfeit it. Pettenger had no authority, no possession, no control. The case of the Frolic is for, rather than against us.

The second Frolic case, 148 Fed. 921, is to the effect that “the innocent owners forfeited with the guilty.” No principle not already discussed is involved in this second Frolic case. The facts are evidently the same as in the first case (treated above), except that the question is as to whether or not a chronometer on the vessel forfeited. There could be no question about its forfeiture under the general rule that property lent, leased or permitted to be used for a hazardous venture incurs all the risks of that venture. The chronometer was forfeited, the court holding that the word “vessel” in section 10 of the Chinese Exclusion Act includes its appurtenances and that the chronometer was leased to the owners and became a part of the vessel’s appurtenances. In our Calypso case there is no lease of the vessel or its appurtenances and no permissive use of any kind. The court says:

“The claim alleges merely that they are the owners of the chronometer. This is not enough to avoid a forfeiture; for the question of title becomes immaterial, if they have in fact consented

to its use as an appurtenance of the vessel. Such consent sufficiently appears, and makes the chronometer part of the vessel for the purposes of forfeiture."

The Frolic, 148 Fed. 923-924.

Dobbins Distillery v. U. S., 96 U. S. 395, 24 L. ed. 637, cited by counsel for the government, page 23 of his brief, was a case where title to land leased for a distillery was forfeited by reason of the illegal acts of the tenant. The court say:

"The unlawful acts of the distiller bind the owner of the property, in respect to the management of the same, as much as if they were committed by the owners themselves. Power to that effect the law vests in him *by virtue of his lease*, and, if he abuses his trust, it is a matter to be settled between him and his lessor; but the acts of violation as to the penal consequences to the property are to be considered just the same as if they were the acts of the owner." (*Italics ours.*)

Dobbins Distillery v. United States, 96 U. S. 395, 24 L. ed., 637.

In U. S. v. Two Barrels of Whiskey, 96 Fed. 479 (C. C. A. 1899), the court construed R. S. 3450, a harsher statute than section 10 of the Chinese Exclusion Act, yet so construed it as to exempt from forfeiture the rights of an innocent mortgagee, entitled to possession. By so much the more will the rule apply in construing section 10 in this case to exempt all the claimants.

R. S. 3450 provides that "every vessel, boat, cart, carriage or other conveyance * * * used in the

removal (of the unstamped whiskey) shall be forfeited.” There are no ameliorating words of any kind in this portion of the statute. There is nothing said about knowledge or innocence. The court say:

“Harvey Latham (the mortgagee) had no interest in this whiskey, had no knowledge of its removal, and had not assented to the use of the horse, mule and wagon for that purpose, and no indictment has been laid against him. * * * It is admitted that Harvey Latham is innocent of any intention to violate the revenue law, and that his property was in the possession of Oliver Deaton without his knowledge or consent, and the question is whether the mere accident of its situation can give it a criminal character independent of its owner’s fault, and thus subject it to the extreme penalty of forfeiture.”

Idem 96 Fed. 479-480.

After calling attention to the fact that it is undoubtedly competent for lawmakers to declare certain acts criminal irrespective of the motive, the court say:

“The object of section 3450 is to punish all persons who, *with intent to defraud the government of the tax* (italics ours), remove or conceal goods upon which the tax has not been paid, and, in addition to the punishment of such persons, it provides that all conveyances and animals used in the accomplishment of this unlawful purpose shall be forfeited. Undoubtedly, there is a presumption against any one whose property is found employed in this unlawful business that it is so engaged with his consent, but can it be that this presumption is irrebuttable? The contention of the government is that, this being a proceeding *in rem*,

it is the guilty thing that has offended, and that this is to be forfeited, irrespective of any participation of its owner. If this team and wagon had been stolen from the owner, it would be clearly unjust, unreasonable and preposterous to forfeit it because it was used by the wrongdoer in the transportation of illicit liquor. If this exception is admitted, it would follow that property has no guilty character, except as connected with persons who have charge of it, and the result is that it is the duty of the court to inquire into the facts; and, if it appears clearly that the owner has not hired or loaned it to another for an unlawful purpose, or knowingly permitted it to be in the possession of a party likely to engage in an unlawful business, or negligently suffered it to be controlled by a stranger, whose character gave no assurance that it would not be unlawfully employed, or is in some way justly chargeable with blame or negligence, he ought not to suffer the sweeping condemnation that justly falls upon those who consciously violate the law, and upon those whom is laid the duty of vigilance, and who negligently or otherwise fail in that duty."

U. S. v. Two Barrels of Whiskey, 96 Fed. 481.

The case then proceeds by citing *U. S. v. Stowell*, 133 U. S. 1, 10 Sup. Ct. 244, 33 L. Ed. 555, to the effect that where the business of a distiller is carried on without knowledge of the mortgagee that a still was to be set up on the mortgaged property, "so far as concerns the real estate, the judgment must be against the equity of redemption only;" also *Boyd v. U. S.* 116, U. S. 616, 6 Sup. Ct. 524, approving the saying: "Goods as goods cannot offend, forfeit, unlade, pay

duties, or the like, but men whose goods they are;” and *Mitchell v. Torup*, Parker 227, to the effect that “the owners of ships are to take care what master they employ and the master what marines.”

The case then quotes Chief Justice Marshall in *Peisch v. Ware*, 4 Cranch 347, “that the removal for which the act punishes the owner with forfeiture of the goods must be made with his consent or connivance, or that of *some person employed or trusted by him*,” and Justice Thompson in 1 Paine 499, Fed. Cas. No. 12, 916: “I am not aware of a single instance where, by any positive provision in the revenue laws, a forfeiture is incurred that does not grow out of some *fraud, misconduct or negligence* of the party on whom the penalty is visited;” and what Judge Brown says in *The Lady Essex*, 39 Fed. 767:

“The authorities are direct to the proposition that a forfeiture of goods for a violation of the revenue laws should not be imposed unless the owner of such goods, or his agent, has been guilty of an infraction of such laws. It is clear that, if the goods be stolen from the owner, or if a person has obtained possession of them fraudulently, or without authority, no act of his can forfeit them as against the true owner.”

Idem 96 Fed. 483.

The court then cites two cases of forfeiture, *U. S. v. Two Horses*, Fed. Cas. No. 16, 578, and *U. S. v. Two Bay Mules*, 36 Fed. 84, and explains these cases, saying:

“In the first case the owner was himself engaged in hauling the whiskey; in the latter he knowingly

permitted another to use his team, who perverted it to the unlawful purpose. While in neither case was there a conscious violation of the law, in both negligence might be fairly attributable, and the thing really punishable was their carelessness in putting their vehicles at the service of those likely to violate the law, and who actually did violate it."

Idem 96 Fed. 483.

In closing, the court says:

"The information is against Harvey Latham, who is alleged to be the owner, and, as we understand the law of North Carolina, he had the right of possession and the right of property; and it would be pressing the implication of negligence further than justice demands, and administering a harsh law too harshly, if, under all circumstances of the case, in the absence of any suspicion of fraud or connivance or proof of negligence, the innocent owner should be made to suffer from the wrong-doing of one who got possession of his property without his knowledge or consent. It is not to be assumed that the government desires to take the property of a citizen charged with no crime without some proof that he has knowingly or negligently contributed to its commission, and undoubtedly the secretary of the treasury, upon the facts of this case agreed upon, and as found by the trial court, would, in the exercise of his discretion, remit the forfeiture; but, if this man has rights, a court of justice is the place to maintain them, and he should not be compelled to ask them of executive officers as a favor. The judgment of the court below is affirmed."

U. S. v. Two Barrels of Whiskey, 96 Fed. 484.

The above is a case where the mortgagee had a right to possession. Here Sassaman has the right to possession and has stipulated for Singleton's benefit that the boat shall be tied up and not operated. Next, the object of R. S. section 3450 was to punish all persons who "with intent to defraud the government" removed the goods. The portion of the section which forfeits "all things used in the removal" says nothing about the intent to defraud applying to them, but the court makes it apply. In our case section 10 applies only to a vessel *whose master knowingly* violates its provisions, and by its terms could not apply to a vessel not in charge of an authorized master.

In our case the owner has not "hired or loaned" the Calypso to another, or "knowingly permitted it" in his possession, or "negligently suffered it to be controlled by a stranger," nor is he "chargeable with blame or negligence," nor "responsible for the fact that it was in the possession of the violator of the law."

"The owners of ships are to take care what masters they employ." Yes. But here no master was employed. On the contrary, the boat was tied up by agreement so that she could hire no crew, make no trips, enter into no contracts. All of this accrues to the protection of the owner and creditors. There was no person "employed or trusted" by appellee, no "fraud, negligence or misconduct" on his part. The vessel was "stolen" or "obtained possession of fraudulently or without authority." The owner did not "knowingly permit another to use" his vessel, "likely to violate the law, and who actually did violate it." An innocent owner

and innocent creditors should not "be made to suffer by the wrong-doing of one who got possession of their property without their knowledge or consent."

Counsel for the U. S. (brief p. 23) cites the case of U. S. v. One Black Horse, 129 Fed. 167-169, apparently as stating a rule different from U. S. v. Two Barrels Whiskey, *supra* (96 Fed. 479; 37 C. C. A. 518). The One Black Horse case declares a forfeiture in strict accordance with R. S. section 3062, but expressly states that the Whiskey case "deals with a statute different from the statutes in the case at bar," and seems to approve the case and esteem it highly. We have already shown that this Whiskey case deals with principles that concern our Calypso case throughout. The One Black Horse case, 129 Fed. 167, is a District Court case, while the Whiskey case is a Circuit Court of Appeal case and presumably of higher authority. However, the cases are not in conflict. The District Court case follows literally the statute. R. S. section 3062 gives no leeway in the matter. The vehicle must forfeit, if not a common carrier. There is no question of "intent to defraud" nor of possession by a validly appointed "master." The only question considered is: Was there smuggled merchandise "on or about any such vehicle?" This is a harsh statute and is enforced against an innocent livery-stable keeper who lets his vehicle to a person who illegally uses it. We are reminded of the remark of Judge Woodruff quoted in the Whiskey case, 96 Fed. 483: "It is expected that the owner of property will see to the uses made of it at his peril." The Calypso was not hired out or let to

anyone. She was not in the hands of a lessee or authorized master. In the *One Black Horse* case the court say:

“Where the intention is left any way obscure, the courts have repeatedly said that the forfeiture of goods for violation of revenue laws would not be imposed, unless the owner of the goods or his agent has been guilty of an infraction of the law.”

U. S. v. One Black Horse, 129 Fed. 168.

Counsel for the U. S. (brief p. 23) cites *U. S. v. Stowell*, 133 U. S. 1, 33 L. ed. 555. That case exempts an innocent mortgagee's interest in land from forfeiture. It is a case having an “*in rem*” feature. Rev. Stat. 3281 as re-enacted by the Act of February 8, 1875, 18 Stat. 310, imposed a fine and imprisonment on the person, and a distinct forfeiture of property, so much so that the court considers carefully various questions as to the personal property alone. The situation is very instructive in our *Calypso* case. First of all, there is a statutory governmental policy in the case of distilleries which exempts innocent mortgagees, and the same policy may well be supposed to inhere in other penal statutes if the wording in any way permits. In the particular section being construed, Rev. Stat. 3281, the wording is that “all * * * personal property, found in the distillery or rectifying establishment, or in any building, room, yard or enclosure connected therewith, and used with or constituting a part of the premises * * * shall be forfeited to the United States.” 18 U. S. Stat. 310. The court say:

“In order to give it such effect as will show any reason for its insertion in the statute, it must be construed to intend, at least, that all personal property which is knowingly and voluntarily permitted by its owner to remain on any part of the premises, and which is actually used, either in the unlawful business, or any other business openly carried on upon the premises, shall be forfeited, even if he has no participation in or knowledge of the unlawful acts or intentions of the person carrying on business there; * * * The present case does not require us to go beyond this, or to consider whether the sweeping words, ‘all personal property,’ must be restricted by implication in any other respect. For instance, as to personal effects having no connection with any business, or as to property stolen or otherwise brought upon the premises without the consent of its owner.”

U. S. v. Stowell, 133 U. S. 1; 33 L. ed. 558.

Here, then, is a statute where *all personal property* found in any building, room, yard or enclosure, connected with the distillery and used with or constituting a part of the premises, is declared forfeited, yet the court seems willing, in the furtherance of justice, to limit that wording to mean property used in the distilling business or openly in connection therewith. Let us suppose that a janitor in the basement of a twenty-three story New York building sets up a still in connection with his boilers. Under the strict wording of this statute the personal property of any tenant in said building would forfeit, because no one can deny that the personal property is in a building and room connected with the illicit still and constituting a part of

the premises. Yet no court would construe the law in this manner. It would first say, and should say, that the statute did not contemplate these conditions; that there must be a direct or implied connection with the offense; that Congress had no power to pass a law forfeiting property having no connection with the illicit act; and that some doctrine of acquiescence or negligence must enter.

Likewise, in our *Calypso* case, it will not be presumed that the court intended that a thief or wholly unauthorized person, or one for whom an owner was in no way responsible, could cause the interest of an innocent owner of the vessel to forfeit. The court should hold that section 10 of the Chinese Exclusion Act uses the word "master" in the legally accepted sense of "agent" or "authorized person," well understanding the law that the enrollment with the customs department adds nothing to his authority and is not binding on the owner unless he participates therein; and, irrespective of this view of the use of the word "master," it will not be presumed that the legislature intended this statute to apply to vessels stolen from their owners, or taken out without authority or any right of possession. And in this connection, we wish to say that it comes with bad grace for the government to insist that Pettenger is master when his enrollment as such was by their negligence and failure to make inquiry as to the validity of his appointment or under a statute that does not provide for or require any such inquiry. It is admitted by all that Pettenger had no authority to act as master when he first caused

himself to be enrolled. The government should either recognize the fact that the enrollment was unauthorized and negligently permitted by it, or consistently take the position that the enrollment is not evidence in this case at all. It should not attempt to use an *ex-parte* act before its officers, of a guilty party, as a foundation for claiming a forfeiture against an innocent party.

Throughout this discussion, it must be borne in mind that the United States has no general authority to define and punish crimes and misdemeanors. Any punishment, penalty or forfeiture which can be enforced by the United States must be a punishment inflicted because of some act done by a guilty or negligent party which affects the collection of revenues, commerce or the carrying on of some department of government under powers expressly delegated by the Constitution to the United States. Therefore, a forfeiture which attempts to take anything which has no connection with such violation would be unconstitutional and incompetent for Congress to enact. There is impliedly written in all penal statutes of the United States the implication that they apply only to wrong-doers and their privies.

In the case of 208 Bags of Kainit, 37 Fed. 326, the court holds that when property is "unlawfully" taken from the possession of the owner and brought ashore in contravention of law, it will not be forfeited against the true owners. This is again the doctrine running through all the cases, that a stranger or unauthorized person cannot affect the rights of an innocent third

party unless said third party has done some act which connects him directly or through his agent with the illegal act. In our *Calypso* case, the boat was not in the hands of an authorized person, but unlawfully taken out for the smuggling trip. The *Kainit* case is very much in point.

In the lower court the government relied on the case of *U. S. v. 220 Patented Machines*, 99 Fed. 559.

There is nothing in this case inconsistent with *U. S. v. Two Barrels of Whiskey*, 96 Fed. 479, and our contention that the *Calypso* does not forfeit. Claimant leased certain cigar-making machines. The lessor knew they were to be used in the manufacture of tobacco and would be subject to forfeiture for violation of the statute. The statute imposing the forfeiture upon all machinery "used in the business" was in legal effect a part of the lease and the lessor has no standing to complain:

"If the owner of such apparatus chooses to lease it to, or in any other way to put it into the hands of, a person engaged in the manufacture of cigars, he must be regarded as transferring the possession with the knowledge that the apparatus may be put to an unlawful use, and may, therefore, be liable to the penalty of forfeiture. He takes the risk, therefore, that the manufacturer will conduct the business in accordance with law; and, if the risk falls out against him, he cannot be heard to set up his own ignorance of the manufacturer's illegal conduct, or his own innocence of unlawful intent."

U. S. v. 220 Patented Machines, 99 Fed. 561.

In the Calypso case, there was no leasing or consenting whatever to the use of the Calypso for this smuggling voyage or for any voyage. On the contrary, there was an agreement that the boat should not be used at all or taken out. Claimants have not placed the Calypso in a position where they cannot be heard to complain. They have every reason to complain and confidently expect protection from a court of the United States upon showing the true situation with reference to the Calypso. This case, upon which the government's counsel relies, cites and approves the *U. S. v. Two Barrels of Whiskey* case, 37 C. C. A. 518, 96 Fed. 479. Speaking of it the court say:

“In the last case the forfeiture was refused upon the ground that the owner of the offending property was not responsible for the fact that it was in the possession of the violator of the law. Upon the facts there proved, the owner was as innocent as if his property had been stolen from him, and then put to the illegal use. Here there is the vital difference that the machines in controversy were deliberately put into the possession of the manufacturer, who was thus enabled to violate the law in the use of the property, and actually did put it to an unlawful use.”

U. S. v. 220 Patented Machines, 99 Fed. 561.

The cases treated in all respects sustain appellee:

First. Forfeiture statutes are to be reasonably construed.

Second. Where the wording is obscure or there are two or more possible constructions, the courts will construe the statute to protect innocent parties.

Third. The statute under construction has no clause of forfeiture except as a master shall knowingly violate the statute, and in the case at bar there was no master.

Fourth. The facts of this case bring us within well recognized exceptions, protecting innocent owners or lienors under as harsh or harsher statutes.

Fifth. It would not be competent for the government to take property for public use from any person without that person directly, indirectly or negligently having violated a law of the United States. It is incredible that the statute refers to a wholly unauthorized person.

Sixth. If the present case were to be decided on principle every consideration protects the innocent creditors and owner.

Boiled down, the question is: Does "master" in section 10 of the Chinese Exclusion Act mean a validly appointed agent? If it does—and it can mean nothing else under the authorities—the interest of Wm. L. Sassaman is protected unless he consented to the illegal trip.

APPELLANT ADOPTED AND EXECUTED THE JUDGMENT
OF THE LOWER COURT, THEREBY WAIVING AN
APPEAL. JURISDICTION WAS LOST BY SURRENDER-
ING POSSESSION OF THE REM.

The question of jurisdiction is most serious on this appeal. We think at appellant's instance the judgment of the lower court was fully executed, custody of the *rem* lost, and that jurisdiction thereof has not been reacquired. The government by executing the judgment

waived its right to take an appeal and is estopped from questioning Sassaman's possession and ownership of the boat. The facts affecting this question are as follows:

1. The final decree was entered October 3, 1914, condemning and forfeiting to the government the undivided one-sixth interest of Pettenger in the Calypso and releasing the five-sixths interest of William L. Sassaman. [Tr. pp. 234-236.]

2. At the order and instance of the government this decree was executed by issuing a writ ordering sale by publication of notice and by a sale at public auction made by the United States marshal.

3. Sassaman purchased Pettenger's interest, paid the purchase price to the marshal, took his bill of sale therefor, took an order for possession of the whole vessel and took possession of the whole vessel October 13, 1914.

4. At said time and prior to any act of the government, or the court, with reference to an appeal, said Sassaman took actual and complete possession of said vessel and its equipment and receipted therefor, and ever since has been in the actual, open, notorious and exclusive possession of said Calypso.

5. Thereafter, without notice to said Sassaman, the United States attorney's office procured to be signed by the district judge and had served upon appellee Sassaman October 15, 1914, a purported temporary restraining order in words and figures as follows:

In the District Court of the United States, in and for the Northern District of California, First Division. In admiralty. No. 15,522.

United States of America v. The Gasoline Launch "Calypso," Her Boats, Tackle, etc.

TEMPORARY RESTRAINING ORDER.

Good cause appearing therefor, and upon motion of Walter E. Hettman, assistant United States attorney,

It is hereby ordered in the above-entitled cause that the gasoline launch "Calypso," an undivided one-sixth interest in which has been forfeited, condemned, and sold by a decree of the above entitled court, be held in its present custody and that the said boat be not removed from the present mooring pending the determination of a petition for an appeal from the decree in the above-entitled cause in the matter of the undivided five-sixths interest in said boat.

Dated October 14, 1914.

M. T. DOOLING,
United States District Judge.

RETURN ON SERVICE OF WRIT.

United States of America, Northern District of California—ss.

I hereby certify and return that I served the annexed temporary restraining order on W. L. Sassaman by handing to and leaving a true and correct copy thereof with said W. L. Sassaman personally at San Francisco in said district on the 15th day of October, A. D. 1914.

J. B. HOLOHAN,
U. S. Marshal.
By C. B. DELANEY,
Deputy.

(Endorsed): Filed Oct. 22, 1914. W. B. Mailing, clerk; by C. W. Calbreath, deputy clerk.

6. Thereafter Sassaman appeared specially before said district judge, praying the court to vacate said purported temporary restraining order as having been entered without jurisdiction, and as being an attempt to recall a judgment executed at the instance of the government and to recall possession of a *rem* sold and surrendered up to Sassaman at the instance of the government. At the close of said hearing the court entered a purported order modifying said temporary restraining order in words and figures as follows:

In the District Court of the United States, in and for the Northern District of California, First Division. In admiralty. No. 15,522.

The United States of America v. The Gasoline Launch "Calypso," Her Boats, Tackle, etc.

ORDER MODIFYING TEMPORARY RESTRAINING ORDER.

The verified petition of claimant, William L. Sassaman, having been filed herein praying this court to vacate its temporary restraining order signed and filed herein October 14, 1914, and said matter having been this day presented to the court and argued by Warren E. Lloyd, Esq., attorney for petitioner, and by John W. Preston, Esq., United States attorney,

It is ordered that said order filed herein October 14, 1914, requiring the gasoline launch "Calypso" to "be held in its present custody and that the said boat be not removed from the present mooring, pending the determination of a petition for an appeal from the decree in the above-entitled cause, in the matter of the undivided five-sixth interest in said boat" be, and the same is hereby vacated and set aside;

It is further ordered that pending the final determination of this cause in whatever court it may be prose-

cuted, possession of said five-sixth interest in said boat be and the same is hereby awarded to petitioner, William L. Sassaman.

It is further ordered that in consideration of the said revocation of said order, that said William L. Sassaman do not sell, encumber or otherwise dispose of the undivided five-sixths interest in said "Calypso" awarded to him as claimant herein, pending the determination of a petition for an appeal from the decree in the above entitled cause as to said undivided five-sixths interest to abide the outcome of said appeal and the execution of the judgment or decree herein and to deliver the same within the jurisdiction of this court or the Circuit Court of Appeals for such purpose should judgment of sale be finally ordered against said five-sixths interest and that, meanwhile, said William L. Sassaman, his agents and employees, be permitted to utilize said boat and operate the same, in or out of, and from any Pacific Coast points or ports of the United States, subject to no penalty hereunder as to wear and tear upon said vessel, her boats, tackle, apparel, furniture or appurtenances, or damage by the elements.

An exception is ordered reserved to petitioner and all claimants and interveners herein to this order, and to the jurisdiction of the court to make the same, except as to that portion hereof vacating the order filed herein October 14, 1914.

Dated October 15th, 1914.

M. T. DOOLING,

United States District Judge.

(Endorsed): Filed Oct. 15th, 1914. W. B. Mailing, clerk; by Lyle S. Morris, deputy.

7. Thereafter, on October 26, 1914, appellant gave the notice of appeal herein. [Tr. pp. 241-242.]

The above facts are more fully set out in the papers on the motion to vacate temporary restraining order and to dismiss appeal for want of jurisdiction, filed herein May 20, 1915, and argued before this court orally May 24, 1915. The salient points, however, are that the decree was executed at the instance of the government and possession surrendered up to Sassaman all before any appeal had been taken. At the time of making said orders no notice of appeal had been given and no petition for appeal filed. There was no supersedeas or order in the nature of a stay. On the contrary, the decree of the court was not only in full force and effect but had been executed.

Our claim is that the court at that time had no jurisdiction whatever to restrain the utilization or operation of the whole of said boat nor to restrain its use at all. It is certain the court could not make a valid order affecting the one-sixth interest which had been sold.

There is another peculiarity about these orders. They purport to make Sassaman an unwilling custodian of the boat. He was before the court to object to the orders and yet is named as custodian by them. This in itself is enough to make the orders insufficient to accomplish any purpose. But the vice of the orders is that they are made without jurisdiction. They do not vacate or set aside the sale, if such action could have been had at that time. They do not modify the decree, if the decree could have been recalled or modified at that time. They do not modify the decree so as to reserve in it any rights of custody regarding the boat, if such reservation could have been made.

On the contrary, without recalling or modifying the decree, and after its execution, these orders attempt to put a restraint upon the use of property which is in the full possession and ownership of a party originally adversary to the government, against whom no appeal was pending and in whose favor a decree had been executed at the instance of the government.

The court could not and did not order a reseizure of the boat. The *rem* was lost, the jurisdiction of the court had vanished for two reasons. First: The government had executed the decree and waived its appeal. Second: The *rem* had been lost and jurisdiction could not revert without a reseizure.

The government is wholly estopped from claiming that Sassaman is not the owner of the boat, freed from all claims growing out of its original seizure. By ordering a public sale and giving unconditional title to the purchaser of Pettenger's interest, the government implies and warrants that it is executing a decree which will give all title it had in the *rem*. The decree is a whole pertaining to one *rem*. It is impossible to split up the matter. Pettenger's interest was sold without any strings upon it. It would be an idle act to sell the interest and then say that the government, by appealing as to Sassaman, tied up the whole boat and retained its custody. We are aware that the modified order of October 15, 1914, refers only to the five-sixths interest of Sassaman, but the original order of October 14, 1914, purports to detain the custody of the whole boat; and the modifying order grows out of and is based on this original order and

is equally without jurisdiction. Not having made any reservations in the decree, or in the sale of Pettenger's interest, or in the delivery of the boat to Sassaman under the decree releasing his interest, the government is clearly estopped from claiming that Sassaman is yet subject to its orders as to custody of the vessel or required to respond at all to a purported appeal.

Not only are the above considerations plain, equitable and founded on sound reasoning, but the nature of an admiralty appeal is such that the government cannot appeal at all without taking up the whole case. If this matter is before this court, it is as a whole with power in this court to enter as complete and full a judgment in the matter as could the lower court. But the government has not brought up the whole case. It has not appealed as against claimants Singleton and Los Angeles Creamery Company. It has put it out of its power to bring up the question of Pettenger's interest. It has really brought no matter before this court at all. Its own cited cases are against it and demonstrate the inconsistency and impossibility of its position.

In purchasing the interest of Pettenger at the government's sale, Sassaman had reason to believe, and did believe that he was entitled to immediate possession of said boat, and that he was acquiring the sole title, interest, claim and possession of the United States of America therein. He received from said government a bill of sale for the possession of said vessel free from any restraint or condition whatever. The judgment and decree ordering sale of said vessel

and the delivery of the possession of the same to Sassaman was a judgment entered against appellant and executed and performed at its instance and vested in Sassaman just what the decree and the bill of sale say. The government cannot by its subsequent *ex parte* acts nullify these first acts. Title and possession passed out of the government. It can neither recall title nor possession.

We quote exactly from appellant's brief (pp. 21-22) to show the necessity of this:

"In *The Lucille*, 19 Wall. 73, 22 L. Ed. 64, the court, speaking by Mr. Justice Miller, said:

"'An appeal in admiralty has the effect to supersede and vacate the decree from which it is taken. A new trial, completely and entirely new, with other testimony and other pleadings, if necessary, or if asked for, is contemplated—a new trial, in which the judgment of the court is regarded as though it had never been rendered. A new decree is to be made in the Circuit Court. This decree is to be enforced by the order of that court, and the record remains there. The case is not sent back to the District Court for executing the decree, or for any other proceeding whatever, and that court has nothing further to do with it. The decree should therefore be complete within itself.'

"In *Irvine v. The Hesper*, 122 U. S. 256, 266, 7 Sup. Ct. 1181, 30 L. Ed. 1178, Mr. Justice Blatchford, delivering the unanimous judgment of the court, said:

"'The claimants not having appealed to the Circuit Court, it is suggested that they are liable

for at least the amount awarded by the District Court, and that the Circuit Court could not reduce that amount, but had jurisdiction, on the actual appeal, only to increase it. It is well settled, however, that an appeal in admiralty from the District Court to the Circuit Court vacates altogether the decree of the District Court, and that the case is tried *de novo* in the Circuit Court. We do not think that the fact that the claimants did not appeal from the decree of the District Court alters the rule. When the libelants appealed, they did so in view of the rule, and took the risk of the result of a trial of the case *de novo*. The whole case was opened by their appeal, as much as it would have been if both parties had appealed, or if the appeal had been taken only by the claimants.’ ”

Nothing could be plainer than the above words. In showing the general nature of an admiralty appeal, counsel for the government has shown this particular appeal impossible. He cannot “supersede and vacate” the decree which he has already executed. He cannot have “a new trial, completely and entirely new, with other testimony and other pleadings,” nor a new trial “in which the judgment of the court is regarded as though it had never been rendered.” The decree here must be enforced by the order of the Circuit Court, “is not sent back to the District Court for executing the decree, or for any other proceedings whatever,” yet before it comes here the lower court has executed the decree, certainly partially, and we think as a whole. We are aware that the government has given notice that it appeals from only “that portion of the final

decree * * * which decrees that the undivided five-sixths interest of William L. Sassaman in said vessel be not condemned and forfeited to the government." [Tr. p. 242.] This does not help, because no one can appeal from a decree he has ordered executed. If, for sake of argument, it be admitted the decree was only executed partially, the appeal still will not lie, owing to this court considering the matter *de novo* and as a whole. An appeal in admiralty "vacates altogether the decree of the District Court."

The case of the Steamer *Lucille*, 19 Wall. 73, 22 L. Ed. 64, above quoted, fully demonstrates this. The Circuit Court merely affirmed the decree of the District Court with costs. The Supreme Court held this was not a final decree, in effect not being a decree at all, because what the costs were was a matter of record in the lower court, leaving the judgment of the Circuit Court incomplete. In the case here there is no pretense but that a vital portion of the judgment has been executed in the lower court and has not even been attempted to be brought up to this court. The result is that no decree can be entered here that will not leave untouched and unaffected by this court the portion of the decree executed in the lower court.

In *Yeaton v. U. S.*, 5 Cranch. 281, 3 L. Ed. 101, the Supreme Court decided that the admiralty appeal was so completely under the control of the Circuit Court that no judgment was deemed entered at all by the lower court, so that if the statute declaring a forfeiture or penalty should be repealed pending an ap-

peal, it would relieve all parties from the effect of a judgment by the lower court, no matter how correct such judgment might have been in the first instance.

This court is in full accord with the above cases in holding that an appeal in admiralty by either party from the District Court to the Circuit Court of Appeals vacates altogether the decree of the District Court and opens the whole case for trial anew in the Appellate Court. *In re* the San Rafael, decided October 16, 1905, by this court, it is said:

“ ‘It is well settled,’ said the Supreme Court in *Irvine v. The Hesper*, 122 U. S. 256, 266, 7 Sup. Ct. 1177, 30 L. Ed. 1175, ‘that an appeal in admiralty from the District Court to the Circuit Court vacates altogether the decree of the District Court, and that the case is tried *de novo* in the Circuit Court. *Yeaton v. United States*, 5 Cranch. 281, 3 L. Ed. 101; *Anonymous*, 1 Gall. 22, Fed. Cas. No. 444; *The Roarer*, 1 Blatchf. 1, Fed. Cas. No. 11,876; *The Saratoga v. 438 Bales of Cotton*, 1 Woods 75, Fed. Cas. No. 12,356; *The Lucille*, 19 Wall. 73, 22 L. Ed. 64; *The Charles Morgan*, 115 U. S. 69, 75, 5 Sup. Ct. 1172, 29 L. Ed. 316. We do not think that the fact that the claimants did not appeal from the decree of the District Court alters the rule. When the libelants appealed, they did so in view of the rule, and took the risk of the result of a trial of the case *de novo*. The whole case was opened by their appeal, as much as it would have been if both parties had appealed, or if the appeal had been taken only by the claimants.’ The same rule applies here, since this court now has the jurisdiction of appeals in admiralty from the District

Court that formerly appertained to the Circuit Court. The Sirius, 54 Fed. 188, 194, 4 C. C. A. 273. The whole of the cases in hand, therefore, were opened by the appeals taken by the petitioner and claimants. It is unimportant that no appeal was taken by McCue, or by the guardian of the widow and children of Alexander Hall, and we must make such disposition of the cases as the records before us show to be proper."

The San Rafael, 141 Fed. 275.

Not having a reply by further brief herein, we may anticipate that counsel for the government will call attention to admiralty rule 3 of this court which provides that the appellant may at his option state in his notice of appeal that he desires only to review one or more questions involved in the case, but that "he shall be concluded in this behalf by such notice." Also that section 3 of rule 4 provides that where the appellant shall appeal specially, the apostles may by stipulation between the proctors contain only such papers, etc., necessary to review the questions raised by the appeal. We reply that all these provisions are limitations on the appellant, merely authorizing him to limit the effect of his appeal as to himself and to shorten the record if opposing counsel will stipulate. They do not show that the appeal does not take up the matter as a whole. In no event could they excuse an appellant who executed the decree in the lower court and then attempts to appeal. Moreover, admiralty rules 1, 7, 8, 9 and 10 of this court can bear no other construction than that the case is tried *de novo* in this court, that the decree of the lower court is

wholly vacated, making the situation entirely inconsistent with taking the case up only in part.

The right to take this appeal has been lost by the government voluntarily surrendering the *rem*.

“It follows, from this consideration, that before judicial cognizance can attach upon a forfeiture in *rem*, under the statute, there must be a seizure; for until seizure it is impossible to ascertain what is the competent forum. And, if so, it must be a good subsisting seizure at the time when the libel or information is filed and allowed. If a seizure be completely and explicitly abandoned, and the property restored by the voluntary act of the party who has made the seizure, all rights under it are gone. Although judicial jurisdiction once attached, it is divested by the subsequent proceedings; and it can be revived only by a new seizure. It is, in this respect, like a case of capture, which, although well made, gives no authority to the prize court to proceed to adjudication, if it be voluntarily abandoned before judicial proceedings are instituted. It is not meant to assert that a tortious ouster of possession, or fraudulent rescue, or relinquishment after seizure, will divest the jurisdiction. The case put (and it is precisely the present case) is a voluntary abandonment and release of the property seized, the legal effect of which must as we think, be to purge away all the prior rights acquired by the seizure.”

Judge Story in *The Brig Ann*, 9 Cranch. 289,
291, 3 L. Ed. 734.

“Messrs. Humphrey, Meade & Gardner certainly did make a seizure, by their open pos-

session of the vessel, and bringing her under the guns of Fort St. Phillip. But there is this objection, both of Mr. Roberts (assuming that he made one) and of the other persons, that it was never followed up in any subsequent prosecution or proceedings. Procedure of Messrs. Humphrey, Meade & Gardner seems to have been voluntarily abandoned by them; and even that of Mr. Roberts, if he made one, does not seem to have been persisted in. Now, a seizure, or capture—call it which we may—if once abandoned, without the influence of superior force, loses all its validity and becomes a complete nullity. Like the common case of a capture at sea, and a voluntary abandonment, it leaves the property open to the next occupant.”

The Josefa Segunda, 10 Wheat. 312, 22 L. Ed. 329.

“Actions in *rem*, strictly considered, are proceedings against property alone, treated as responsible for the claims asserted by the libelants or plaintiffs. The property itself is in such actions the defendant, and, except in cases arising during war for its hostile character—its forfeiture or sale is sought for the wrong, in the commission of which it has been the instrument, or for debts or obligations for which by operation of law it is liable. The court acquires jurisdiction over the property in such cases by its seizure and of the subsequent proceedings by public citation to the world, of which the owner is at liberty to avail himself by appearing as a claimant in the case.”

Judge Field in Freeman v. Alderson, 119 U. S. 185, 30 L. Ed. 372.

In *Taylor v. Sawyer*, 11 L. Ed. 132, opinion by Judge Tawney, the U. S. District Court of Alabama gave decree against an executor for about \$5000 before any appeal was taken. The state court with jurisdiction removed the executor and appointed an administrator c. t. a. An appeal was then taken against the prior executor. It was held that no valid appeal was pending in the Supreme Court.

In *Hovey v. McDonald*, 27 L. Ed. 888, 892, it is held that a decree ordering payment of money by a receiver or dissolving an injunction is not stayed by a supersedeas unless provided for in the decree. A receiver cannot be held liable who obeys the decree.

In this *Calypso* case the execution of the decree is at least equivalent to the dissolving of an injunction, no stay being provided for in the decree.

THE FACTS FOUND BY THE LOWER COURT SHOULD NOT BE DISTURBED.

Irrespective of the fact that an appeal to this court is a trial *de novo*, it is certain that this court adheres firmly to the rule that it will not disturb the findings of fact by the lower court unless there is a clear abuse of discretion.

“While this court is not limited to the review of questions of law, only, in admiralty appeals, it is nevertheless the settled practice to give great weight to the findings of fact by the trial judge, and not to disturb such findings, in cases of conflicting testimony, unless they are found to be clearly against the weight of the evidence. The

Alijandro, 56 Fed. 621, 6 C. C. A. 54; The Brandywine, 87 Fed. 652, 31 C. C. A. 187."

The Oscar B., 121 Fed. 978, 981.

We are well aware that this rule is based upon the reasoning that the district judge saw and heard the witnesses and is better qualified than the Appellate Court to judge of their truth or falsity. It is also based upon the consideration that a difficult and conflicting matter once settled, even upon a record of written evidence, should not lightly be disturbed. The Circuit Court of Appeals, First Circuit, in "Steam Dredge No. 1" say:

"We have carefully examined the record, and while there are unquestionably serious doubts on all the mere questions of fact—whether the libellant, and also whether those in charge of the barge, were each guilty of negligence—yet, under the circumstances stated, we cannot determine that any conclusion we might reach, different from those reached by the District Court, would be more satisfactory to ourselves, or better supported by the record. * * * However all these things may have been, we cannot, as we have already said, satisfy ourselves that, if we should reverse the conclusions of the District Court on these mere questions of fact, we should reach any new conclusions which could be better supported than those of that court."

Steam Dredge No. 1, 134 Fed. 161, 67 C. C. A. 67, 69 L. R. A. 297.

From the foregoing it appears that the presumptions are all in favor of the record and decision of the

lower court, and in all cases the decisions of a trial court on questions of fact are entitled to great respect and will not be reversed unless manifestly contrary to a preponderance of the evidence.

Counsel for the government has been more than diligent in behalf of the authority he represents. Throughout these long proceedings we have been oppressed by the fact that many of the rules he invokes are governed by considerations of public policy which put upon a defendant a heavy burden, relieved somewhat in this case, however, by the uniform courtesy of the United States attorney's office. The brief we have had to answer is terse and forceful, but we must insist that the government in convicting Pettenger as a manifest violator of the law and in forfeiting his interest in the Calypso has done its full duty. The government should now leave undisturbed the decree of the lower court under which a sale of this forfeited interest was made and under which the *rem* has been restored to William L. Sassaman uncondemned.

Respectfully submitted,

BLACK & CLARK,

948 Market Street, San Francisco, Cal.;

WARREN E. LLOYD,

906 Central Building,

Proctors for William L. Sassaman, Appellee.

United States
Circuit Court of Appeals

For the Ninth Circuit.

PUGET SOUND TRACTION, LIGHT & POWER
COMPANY, a Corporation,
Plaintiff in Error,
VS.

M. A. HUNT and MARY A. HUNT, His Wife,
Defendants in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of
the Western District of Washington, Northern Division.

Filed

JAN 48 1915

F. D. Monckton,

Clerk

No. 2546

United States
Circuit Court of Appeals
For the Ninth Circuit.

PUGET SOUND TRACTION, LIGHT & POWER
COMPANY, a Corporation,
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VS.

M. A. HUNT and MARY A. HUNT, His Wife,
Defendants in Error.

Transcript of Record.

**Upon Writ of Error to the United States District Court of
the Western District of Washington, Northern Division.**

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*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 2700.

M. A. HUNT and MARY A. HUNT, His Wife,
Plaintiffs,

vs.

PUGET SOUND TRACTION, LIGHT & POWER
CO., a Corporation,
Defendant.

Names and Addresses of Counsel.

JAMES B. HOWE, Esq., Attorney for Plain-
tiff in Error, 403 Electric Building, Seattle,
Washington.

A. J. FALKNOR, Esq., Attorney for Plaintiff
in Error, 403 Electric Building, Seattle,
Washington.

T. F. BEVINGTON, Esq., Attorney for De-
fendant in Error, 907 American Bank
Building, Seattle, Washington.

F. E. HAMMOND, Esq., Attorney for Defend-
ant in Error, 602 Mutual Life Building,
Seattle, Washington.

J. M. HAMMOND, Esq., Attorney for Defend-
ant in Error, 602 Mutual Life Building,
Seattle, Washington. [1*]

*Page-number appearing at foot of page of original certified Record.

*In the Superior Court of the State of Washington in
and for the County of King.*

No. —.

M. A. HUNT and MARY A. HUNT, His Wife,
Plaintiffs,

vs.

PUGET SOUND TRACTION LIGHT & POWER
COMPANY, a Corporation,
Defendant.

Complaint.

Come now the plaintiffs and for their first cause of action against the defendant, state:

COUNT I.

I.

That at all times hereinafter mentioned the plaintiffs were, and now are, husband and wife, living together as such with an established marital community, and residing at Seattle in King County, State of Washington.

II.

That at all times hereinafter mentioned, the defendant, Puget Sound Traction Light & Power Company was, and now is, a corporation, duly organized and existing under the laws of the State of Massachusetts, with the object and purpose of maintaining and operating a street railway in the City of Seattle, King County, Washington, and other places, with its principal place of business at Seattle, King County, Washington.

III.

That the plaintiffs on and prior to the 23d day of September, A. D. 1913, as such community, were the owners of, and running and operating an automobile for hire and for the benefit of said community, over the streets of Seattle, King County, Washington.
[2]

IV.

That the defendant, Puget Sound Traction Light & Power Company, a corporation, on and prior to said 23d day of September, A. D. 1913, was the owner of and operating a street-car system in the City of Seattle, King County, Washington.

V.

That on said 23d day of September, A. D. 1913, the plaintiff, M. A. Hunt, was in charge of and driving said automobile belonging to the said plaintiffs, on 27th Avenue, and was, while in the exercise of due care and caution on his part, approaching the intersection of 27th Avenue and East Cherry Street in Seattle, Washington.

VI.

That on said date, the defendant, in the operation of its street-car system, through its employees, was running and operating one of its street-cars on said East Cherry street, running the same from a westerly to an easterly direction thereon, approaching and crossing said intersection of 27th Avenue and East Cherry street. That at said time and place, the defendant, through its employees, was running said street car in a careless, negligent and reckless manner and as it approached and crossed the inter-

section of said street, in this, they were carelessly and negligently running said street car at an exceedingly high, dangerous and unlawful rate of speed. That they carelessly and negligently failed to ring a bell or gong or give any warning of the approach of said street car at said crossing. That they carelessly and negligently failed and neglected to put on any brakes, check or in any manner reverse or stop said street car as it approached and crossed the intersection of said streets, or in any other manner give a warning of its approach. That at said time and place, the defendant and its employees were further negligent in that they were operating and running said street car at a rate of speed in excess of twelve (12) miles per hour in violation of Ordinance No. 24597, passed the 11th day of July, A. D. 1910, entitled: "An Ordinance regulating travel and traffic on the streets of the City of Seattle, providing penalties for the violation thereof, and repealing Ordinances [3] or parts of Ordinances in conflict therewith." That in addition to the negligence of the defendant and its employees as aforesaid, they were careless and negligent in this; that said defendant failed to stop said street car, although it could have done so, after the plaintiff, M. A. Hunt, in the operation and running of the automobile, as aforesaid, as it approached said crossing on 27th Avenue, had reached a point where said automobile and said M. A. Hunt, as the driver thereof, were in plain view and after the Motorman operating said defendant's street car saw said automobile and the driver thereof, or in the exercise of ordinary care and prudence could have seen said automobile and driver

thereof, and said Motorman in charge of said street car could have avoided the collision and injuries herein complained of, which said defendant and its Motorman carelessly and negligently failed to do.

VII.

That at said time and place and in broad day light at the hour of about 11:00 o'clock A. M., September 23d, A. D. 1913, by reason of the carelessness and negligence of the defendant and its employees as aforesaid, the automobile of the plaintiffs', when it had come to a full stop, at a point near the tracks of the defendant company, on East Cherry street, was hit by the said street car of the defendant Company, to wit: Street Car No. 361, by reason of which, said automobile was badly broken and damaged, and by reason thereof the plaintiffs were deprived of the use of said automobile for the period of thirty-eight (38) days. That the damage to said automobile and the reasonable costs of the repair thereof, was and is of the actual value of Five Hundred Twenty-nine and $73/100$ (\$529.73) Dollars. That the loss of the use of said automobile, which was being used by the plaintiffs for hire, was and is of the reasonable value of Ten (\$10.00) Dollars per day, or the aggregate sum of Three Hundred and Eighty (\$380.00) Dollars, and in all the full sum of Nine Hundred Nine and $73/100$ (\$909.73) Dollars. That although demand has been made [4] therefor, defendant has neglected and refused to pay the plaintiffs said sum, and there is now due and owing the plaintiffs from the defendant on account thereof, the sum of Nine Hundred Nine and $73/100$ (\$909.73) Dollars, no part

of which has been paid.

PLAINTIFFS for their further and second cause of action against the defendant, state:

COUNT II.

I.

That at all times hereinafter mentioned the plaintiffs were, and now are, husband and wife, living together as such with an established marital community, and residing at Seattle in King County, State of Washington.

II.

That at all times hereinafter mentioned, the defendant, Puget Sound Traction Light & Power Company was, and now is, a corporation, duly organized and existing under the laws of the State of Massachusetts, with the object and purpose of maintaining and operating a street railway in the City of Seattle, King County, Washington, and other places, with its principal place of business at Seattle, King County, Washington.

III.

That the plaintiffs on and prior to the 23d day of September, A. D. 1913, as such community, were the owners of and running and operating an automobile for hire and for the benefit of said community, over the streets of Seattle, King County, Washington.

IV.

That the defendant, Puget Sound Traction Light & Power Company, a corporation, on and prior to said 23d day of September, A. D. 1913, was the owner of and operating a street car system in the City of Seattle, King County, Washington. [5]

V.

That on said 23d day of September, A. D. 1913, the plaintiff, M. A. Hunt, was in charge of and driving said automobile belonging to the said plaintiffs, on 27th Avenue, and was, while in the exercise of due care and caution on his part, approaching the intersection of 27th Avenue and East Cherry street in Seattle, Washington.

VI.

That on said date, the defendant, in the operation of its street car system, through its employees, was running and operating one of its street cars on said East Cherry street, running the same from a westerly to an easterly direction thereon, approaching and crossing said intersection of 27th Avenue and East Cherry street. That at said time and place, the defendant, through its employees, were running said street car in a careless, negligent and reckless manner and as it approached and crossed the intersection of said street, in this, they were carelessly and negligently running said street car at an exceedingly high, dangerous and unlawful rate of speed. That they carelessly and negligently failed to ring a bell or gong or give any warning of the approach of said street car at said crossing. That they carelessly and negligently failed and neglected to put on any brakes, check or in any manner reverse or stop said street car as it approached and crossed the intersection of said streets, or in any other manner give a warning of its approach. That at said time and place, the defendant and its employees were further negligent in that they were operating and running said street car at

a rate of speed in excess of twelve (12) miles per hour in violation of Ordinance No. 24597, passed the 11th day of July, A. D. 1910, entitled : "An Ordinance regulating travel and traffic on the streets of the City of Seattle, providing penalties for the violation thereof, and repealing Ordinances or parts of Ordinances in conflict therewith." That in addition to the negligence of the defendant and its employees as aforesaid, they were careless and negligent in this; that said defendant failed to stop said street car, although it could have done so, after the [6] plaintiff, M. A. Hunt, in the operation and running of the automobile, as aforesaid, as it approached said crossing on 27th Avenue, had reached a point where said automobile and said M. A. Hunt, as the driver thereof, was in plain view and when the Motorman on said defendant's street car saw said automobile and the driver thereof, or in the exercise of ordinary care and prudence could have seen said automobile and the driver thereof, said Motorman carelessly and negligently failed to check or stop said street car and thereby avoid the collision and injuries herein complained of, all of which said defendant and its Motor man could have done by the exercise of due care and caution.

VII.

That at said time and place and in broad day light at the hour of about 11:00 o'clock A. M., September 23d, A. D. 1913, by reason of the carelessness and negligence of the defendant and its employees as aforesaid, the automobile of the plaintiffs', when it had come to a full stop, at a point near the tracks of

the defendant company, on East Cherry Street, was hit by the street car of the defendant Company, to wit: Street Car No. 361, and the plaintiff, M. A. Hunt, without any fault or negligence on his part, while driving and operating said automobile and seated therein, by reason of said car striking said automobile, was greatly shocked, strained, bruised and injured. That said injuries were to the back, spine and particularly in the cervical and lumbar regions of the spine. That the 10th, 11th and 12th ribs on the right side of said plaintiff, M. A. Hunt, were badly bruised and injured and the cartilage torn therefrom. That the pleura covering the vitals, especially on the right side of said plaintiff, M. A. Hunt, was badly injured, causing what is known as traumatic pleurisy. That the abdomen of the plaintiff, M. A. Hunt, was badly bruised, and that by reason of said collision and through the defendant's negligence, said plaintiff, M. A. Hunt, sustained various other dangerous and painful injuries in and on various parts of his body, and has been permanently injured. [7]

VIII.

That as a result of said negligence on the part of the said defendant company, and the injuries resulting to said plaintiff, M. A. Hunt, said Hunt was rendered unconscious for a period of five (5) days and was confined to his home for a period of four weeks, being confined to his bed most of that time. That by reason of said negligence and the injuries sustained, the plaintiff, M. A. Hunt, in addition to the injuries above enumerated, was greatly shocked, and has ever since suffered and is still suffering great physical

pain and mental anguish, and will continue to suffer from the same for a long time in the future.

IX.

That the plaintiffs have been compelled to and did incur for medical services rendered, and medicine to date, the sum of Seventy-five (\$75.00) Dollars, and the further charges for future services for Doctors and medicine will be a sum not less than Seventy-five (\$75.00) Dollars, which are the direct and proximate result of the defendant's said negligence and carelessness.

X.

That by reason of said negligence of the defendant Company, as aforesaid, and the injuries sustained by the plaintiff, M. A. Hunt, the plaintiffs thereby have lost to date the time and services of the plaintiff, M. A. Hunt, for a period of One Hundred and twenty (120) days, which were and are of the reasonable value of Fifteen (\$15.00) per day, or of the aggregate value of Eighteen Hundred (\$1800.00) Dollars.

XI.

That by reason of said negligence of the defendant Company, as aforesaid, and said injuries sustained by said plaintiff, M. A. Hunt, the plaintiffs have been damaged on account of future loss of time and services, and for said injuries, physical and mental pain and anguish, and permanent injuries to said plaintiff, M. A. Hunt, in the further sum of Five Thousand (\$5000.00) Dollars, no part [8] of which has been paid; and the plaintiffs allege that all and singular the damages and injuries suffered by the said plaintiffs as hereinbefore set forth, was and is the

direct and proximate cause of the carelessness and negligence of the defendant Company.

WHEREFORE, the plaintiffs ask and pray for judgment against the defendant for the sum of Nine Hundred Nine and 73/100 (\$909.73) Dollars on account of plaintiffs' first cause of action, and for the sum of Six Thousand Nine Hundred and Fifty (\$6950.00) Dollars on account of plaintiffs' second cause of action, or for the total sum of Seven Thousand Eight Hundred Fifty-nine and 73/100 (\$7859.73) Dollars on both causes of action, and for their costs and disbursements herein.

T. F. BEVINGTON,
HAMMOND & HAMMOND,
Attorneys for Plaintiffs.

State of Washington,
County of King,—ss.

M. A. Hunt, being first duly sworn, on oath deposes and says; That he is one of the plaintiffs in the above entitled action; That he has read the foregoing complaint, knows the contents thereof, and that the same and the statements therein made are true as he verily believes.

M. A. HUNT.

Subscribed and sworn to before me this 23d day of January, A. D. 1914.

EDWARD VONTABLE,
Notary Public in and for the State of Washington,
Residing at Seattle.

Filed in Clerks Office, Feb. 10, 1914. W. K. Sickels, Clerk. By F. W. Smith, Deputy.

[Indorsed]: Filed in the U. S. District Court,
Western Dist. of Washington, Northern Division.
Mar. 10, 1914. Frank L. Crosby, Clerk. By E. M.
L. Deputy. [9]

*In the District Court of the United States for the
Western District of Washington, Northern
Division.*

No. 2700.

M. A. HUNT and MARY A. HUNT, His Wife,
Plaintiffs,

vs.

PUGET SOUND TRACTION, LIGHT & POWER
COMPANY, a Corporation,
Defendant.

Answer.

Comes now the defendant and for answer to the
first cause of action set up in the complaint of the
plaintiffs herein alleges:

I.

For answer to the allegations of Paragraph I of
Count I of plaintiffs' complaint, this defendant
denies any knowledge or information thereof suffi-
cient to form a belief.

II.

For answer to the allegations of Paragraph II of
Count I of plaintiffs' complaint, this defendant
admits the same.

III.

For answer to the allegations of Paragraph III of

Count I of plaintiffs' complaint, this defendant denies the same.

IV.

For answer to the allegations of Paragraph IV of Count I of plaintiffs' complaint, this defendant admits the same.

V.

For answer to the allegations of Paragraph V of [10] Count I of plaintiffs' complaint, this defendant admits that on the 23d day of September, 1913, the plaintiff, M. A. Hunt, was in charge of and driving an automobile on Twenty-seventh Avenue, but denies each and every other allegation therein contained.

VI.

For answer to the allegations of Paragraph VI of Count I of plaintiffs' complaint, this defendant denies the same.

VII.

For answer to the allegations of Paragraph VII of Count I of plaintiffs' complaint, this defendant denies the same and particularly denies that the plaintiffs, or either of them, have been damaged in the sum of Nine Hundred and Nine and 73/100 Dollars (\$909.73), or in any other sum or at all.

For a further answer and first affirmative defense to said Count I of plaintiffs' complaint, this defendant alleges that whatever damages, if any, the plaintiffs, or either of them, received were caused and contributed to by the careless and negligent acts of the plaintiff M. A. Hunt.

For a further answer and second affirmative de-

fense to said Count I of plaintiffs' complaint, this defendant alleges that on the 23d day of September, 1913, the plaintiffs had but a contract to purchase said automobile, upon which said 23d day of September, 1913, Four Hundred Dollars (\$400.00) had been paid upon said contract of purchase, and that since said date on account of the failure and neglect of the plaintiffs to pay the contract price the contract has been forfeited and the machine taken back by the vendor. [11]

For answer to the further and second cause of action set up in plaintiffs' complaint this defendant alleges:

I.

For answer to the allegations of Paragraph I of Count II of plaintiffs' complaint, this defendant denies any knowledge or information thereof sufficient to form a belief.

II.

For answer to the allegations of Paragraph II of Count II of plaintiffs' complaint, this defendant admits the same.

III.

For answer to the allegations of Paragraph III of Count II of plaintiffs' complaint, this defendant denies the same.

IV.

For answer to the allegations of Paragraph IV of Count II of plaintiffs' complaint, this defendant admits the same.

V.

For answer to the allegations of Paragraph V of

Count II of plaintiffs' complaint, this defendant admits that on the 23d day of September, 1913, the plaintiff M. A. Hunt was in charge of and driving an automobile on said Twenty-seventh Avenue, but denies each and every other allegation therein contained.

VI.

For answer to the allegations of Paragraph VI of Count II of plaintiffs' complaint, this defendant denies the same.

VII.

For answer to the allegations of Paragraph VII of Count II of plaintiffs' complaint, this defendant denies the [12] same.

VIII.

For answer to the allegations of Paragraph VIII of Count II of plaintiffs' complaint, this defendant denies the same.

IX.

For answer to the allegations of Paragraph IX of Count II of plaintiffs' complaint, this defendant denies the same.

X.

For answer to the allegations of Paragraph X of Count II of plaintiffs' complaint, this defendant denies the same.

XI.

For answer to the allegations of Paragraph XI of Count II of plaintiffs' complaint, this defendant denies the same and particularly denies that plaintiffs, or either of them, have been damaged in the

sum of Five Thousand Dollars (\$5000.00) or in any other sum or at all.

For a further answer and affirmative defense to said Count II of plaintiffs' complaint, this defendant alleges that whatever injuries or damages, if any, the plaintiffs, or either of them, received were caused and contributed to by the careless and negligent acts of the plaintiff M. A. Hunt.

WHEREFORE this defendant prays that this action be dismissed and that it recover its costs and disbursements herein.

JAMES B. HOWE,

A. J. FALKNOR,

Attorneys for Defendant. [13]

State of Washington,

County of King,—ss.

A. L. KEMPSTER, being first duly sworn, on his oath deposes and says: That he is the manager of the Puget Sound Traction, Light & Power Company, a corporation, defendant in the within-entitled action; that he has read the foregoing Answer, knows the contents thereof and believes the same to be true. That he makes this verification because said defendant is a corporation and affiant is its manager.

A. L. KEMPSTER.

Subscribed and sworn to before me this 7th day of April, 1914.

[Seal]

R. G. SHARPE,

Notary Public in and for the State of Washington,
Residing at Seattle.

Copy of within Answer received and service acknowledged this 7th day of April, 1914.

T. F. BEVINGTON,

HAMMOND & HAMMOND,

Attorneys for Plaintiff.

[Indorsed]: Answer. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Apr. 8, 1914. Frank L. Crosby, Clerk. By E. M. L., Deputy. [14]

*In the District Court of the United States for the
Western District of Washington, Northern
Division.*

No. 2700.

M. A. HUNT and MARY A. HUNT, His Wife,
Plaintiffs,

vs.

PUGET SOUND TRACTION, LIGHT & POWER
COMPANY, a Corporation,
Defendant.

Reply.

Come now the plaintiffs in the above-entitled action, by T. F. Bevington and Hammond & Hammond, their attorneys, and for their reply to the answer of the defendant filed herein, say:

I.

That for their reply to the first affirmative defense contained in defendant's answer to Count I of plaintiff's complaint, they deny that whatever damages plaintiffs, or either of them have received, were

caused and contributed to by the careless and negligent acts of the plaintiff, M. A. Hunt.

II.

That for their reply to the second affirmative defense contained in defendant's answer to Count I of Plaintiff's complaint, said plaintiffs say, that they deny each and every allegation contained therein, except as hereinafter stated, and these plaintiffs say, that upon the said 23d day of September, 1913, the said plaintiffs had purchased upon contract, the automobile referred to in plaintiff's complaint, and had paid upon the purchase price of the same, the sum of Four (\$400.00) Hundred Dollars. That upon said date, said plaintiffs were entitled to and were in possession of said automobile and operating the same. That because [15] of the negligent acts of the defendant, referred to in plaintiff's complaint, and the injuries and damages sustained by the said plaintiffs, and the loss of the use of the said automobile, the plaintiffs were prevented from making the next payment due upon said automobile, on the 5th day of October, A. D. 1913, and that subsequently thereto the said plaintiffs were compelled to return said automobile to the Pacific Car Company, the original vendor of the same.

III.

That for their reply to the affirmative defense contained in defendant's answer to Count II of plaintiffs' complaint, said plaintiffs deny that the injuries and damages the plaintiffs, or either of them received, were caused and contributed by the careless and negligent acts of the plaintiff, M. A. Hunt.

WHEREFORE, plaintiffs pray as in their complaint.

T. F. BEVINGTON and
HAMMOND & HAMMOND,
Attorneys for Plaintiffs. [16]

State of Washington,
County of King,—ss.

M. A. Hunt being first duly sworn, on oath, deposes and says: That he is one of the plaintiffs mentioned in the foregoing reply; that he has read the same, knows the contents thereof, and that the same and the statements therein contained are true as he verily believes.

M. A. HUNT.

Subscribed and sworn to before me this 21 day of April, A. D. 1914.

EDWARD VAN TOBLE,
Notary Public in and for the State of Washington,
Residing at Seattle.

Service of the within Reply by delivery of a copy to the undersigned is hereby acknowledged this 22d day of April, 1914.

JAMES B. HOWE,
A. J. FALKNOR,
Attorneys for Defendant.

[Indorsed]: Reply. Filed in the District Court, Western Dist. of Washington, Apr. 24, 1914. Frank L. Crosby, Clerk. By E. M. L. Deputy. [17]

*In the District Court of the United States for the
Western District of Washington.*

No. 2700.

M. A. HUNT and MARY A. HUNT, His Wife,
Plaintiffs,

vs.

PUGET SOUND TRACTION, LIGHT & POWER
COMPANY, a Corporation,
Defendant.

Verdict.

We, the jury in the above-entitled cause, find for
the plaintiffs and assess their damages at the sum
of \$500.00.

J. B. SEAVEY,
Foreman.

[Indorsed]: Verdict. Filed in the U. S. District
Court, Western Dist. of Washington, Sep. 26, 1914.
Frank L. Crosby, Clerk. By S. E. Leitch, Dep-
uty. [18]

*In the United States District Court for the Western
District of Washington, Northern Division.*

No. 2700.

M. A. HUNT and MARY A. HUNT, His Wife,
Plaintiffs,

vs.

PUGET SOUND TRACTION, LIGHT & POWER
COMPANY, a Corporation,
Defendant.

Judgment.

BE IT REMEMBERED, That the above-entitled cause was duly and regularly set for trial to be had upon the 22d day of September, A. D. 1914, and upon the said date was duly and regularly continued until the 23d day of September, A. D. 1914, and upon said 23d day of September, A. D. 1914, was duly and regularly continued until the 24th day of September, A. D. 1914, at which time the said cause came on regularly for trial; plaintiffs appearing in person and by Thomas F. Bevington, Esq., and F. E. Hammond, Esq., their attorneys, and the defendant appearing by A. J. Falknor, its attorney; and a jury having been duly and regularly called and impaneled to try the cause, the said cause proceeded to trial;

WHEREUPON, Counsel for the plaintiffs and the defendant, made their opening statements to the jury, and the plaintiffs proceeded to the introduction of their evidence, and the defendant having introduced its evidence, and after the arguments of counsel to the jury, and after the Court had instructed the jury, and after counsel for and on behalf of plaintiffs and defendant had taken their exceptions to the giving of instructions by the Court, and the refusal of the Court to give certain other instructions, said [19] jury retired, considered the evidence and thereafter on the 26th day of September, A. D. 1914, said jury returned into the court its verdict, finding for and on behalf of the plaintiffs in the sum of Five Hundred (\$500.00) Dollars; and the said verdict having been duly and regularly received

by the Court and filed in the cause, and the plaintiffs having made their motion for a judgment upon said verdict, and the Court being fully advised in the premises;

NOW THEREFORE, It is ordered, adjudged and decreed, that the said plaintiffs, M. A. Hunt and Mary A. Hunt, his wife, have and recover of the said defendant, Puget Sound Traction, Light & Power Company, a corporation, the sum of Five Hundred (\$500.00) Dollars, together with interest and costs of this action, taxed at \$87.48, and that execution issue therefor.

Done in open court this 2d day of November, A. D. 1914.

JEREMIAH NETERER,

Judge.

Copy of within Notice and Judgment received and due service of same acknowledged this 30th day of Oct., 1914.

JAMES B. HOWE,

A. J. FALKNOR,

Attorneys for Def.

[Indorsed]: Notice. Judgment. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Nov. 2, 1914. Frank L. Crosby, Clerk. By E. M. L., Deputy. [20]

*In the District Court of the United States for the
Western District of Washington, Northern
Division.*

No. 2700.

M. A. HUNT and MARY A. HUNT, His Wife,
Plaintiffs,

vs.

PUGET SOUND TRACTION, LIGHT & POWER
COMPANY, a Corporation,

Defendant.

**Stipulation [Extending Time to Serve Bill of
Exceptions, etc.].**

IT IS HEREBY STIPULATED that the defendant shall have up to and including the 26th day of October, 1914, within which to serve upon the plaintiffs a draft or copy of its proposed bill of exceptions in the above action, and that an order may be entered in the above court and cause to that effect.

T. F. BEVINGTON,

F. E. HAMMOND,

Attorneys for Plaintiffs.

JAMES B. HOWE,

A. J. FALKNOR,

Attorneys for Defendant. [21]

*In the District Court of the United States for the
Western District of Washington, Northern
Division.*

No. 2700.

M. A. HUNT and MARY A. HUNT, His Wife,
Plaintiffs,

vs.

PUGET SOUND TRACTION, LIGHT & POWER
COMPANY, a Corporation,

Defendant.

**Order [Extending Time to Serve Bill of Exceptions,
etc.].**

In accordance with the stipulation of the parties hereto, it is hereby ORDERED and ADJUDGED that the defendant's time within which to serve upon the plaintiffs a draft or copy of its proposed bill of exceptions in the above action, be, and the same is, hereby extended, and the defendant is allowed up to and including the 26th day of October, 1914, within which to prepare and serve upon the plaintiffs a draft or copy of its proposed bill of exceptions in the above action.

JEREMIAH NETERER,
Judge.

O.K. T. Bevington.
F. E. Hammond.

[Indorsed]: Stipulation and Order Extending Time Within Which to Serve Proposed Bill of Exceptions. [22]

*In the District Court of the United States for the
Western District of Washington, Northern
Division.*

No. 2700.

M. A. HUNT, et al.,

Plaintiffs,

vs.

PUGET SOUND TRACTION, LIGHT, and
POWER COMPANY, a Corporation,
Defendant.

Defendant's Proposed Bill of Exceptions.

First Exception.

BE IT REMEMBERED, that in the trial of this case on the 24th day of September, 1914, before the Honorable Jeremiah Neterer, both parties appearing by counsel, the jury was duly empaneled and sworn, and at the close of all the evidence the defendant challenged the sufficiency of the evidence to sustain a verdict for the plaintiff, for the reason that the evidence showed that the injuries which the plaintiff received, if any, were caused by his own careless acts and negligence, and asked the Court to instruct the jury to return a verdict for the defendant. Such request and motion of the defendant was denied by the Court, and with the denial thereof the defendant duly excepted and its exception was allowed.

The defendant submits the following stenographic report of the trial herein, consisting of pages 4 to 216, inclusive, which is all of the evidence given and received upon the trial of the action, together with

all exhibits, being Plaintiffs' Exhibits 1, 2, 3, 4, 5, 6, 8 and 9, and Defendant's Exhibits "A," "B," "C," "D," "E" and "F," referred to and received in evidence, as a bill of exceptions in support of this its first exception: [24]

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[26]

[Testimony of Albro Gardner, Jr., for Plaintiffs.]

ALBRO GARDNER JR., produced as a witness on behalf of plaintiffs, being first duly sworn, testifies as follows:

Q. (By Mr. HAMMOND) What is your name?

A. Albro Gardner, Jr.

Q. What is your business, Mr. Gardner?

(Testimony of Albro Gardner, Jr.)

A. Civil engineer.

Q. How long have you been engaged in that business? A. Most of the time since 1892.

Q. I wish you would state whether or not at my request you went out to the corner of 27th Avenue and Cherry Street and took some measurements of the ground there? A. I have, yes, sir.

Q. Did you make a diagram of that locality and put upon paper your measurements?

A. I understand that was your other question. I have. Yes, sir.

Q. I wish you would state—I am handing you a diagram marked “Plaintiff’s Exhibit No. 1 for identification,” and ask you what that is?

A. That is a map showing—I will read the title of it, “Map showing location of street improvements and Puget Sound Traction Light & Power Company tracks at 27th and East Cherry Street.

Mr. FALKNOR.—Those measurements are accurate? A. They are.

Mr. HAMMOND.—We offer the map in evidence.

Mr. FALKNOR.—Let me see if there is anything marked on there.

The COURT.—If there is no objection it will be admitted.

(Map received in evidence and marked “Plaintiff’s Exhibit No. 1.”) [27]

Q. I wish you would state, Mr. Gardner, what these rings indicate at various places on the map?

A. The small circles are manholes.

Q. These circles here at the crossing indicate the

(Testimony of Albro Gardner, Jr.)

manholes. That is the drain?

A. Where the surface water from the pavement runs into the sewer.

Q. Here on 27th Avenue, the east side of 27th Avenue, the north side of Cherry Street, is a circle marked "Pole."

A. That is a telegraph pole. Either a telegraph or an electric light pole.

Q. And the hydrant is also marked? A. Yes.

Q. And on the map is marked "pole" at different places. That means telegraph or telephone poles?

A. Yes.

Q. And the distance from the different letters is indicated where? A. On the face of the map.

Q. For instance, "A" to "B," nine feet; from "B" to "C," twelve feet; "C" to "D," 180 feet; "C" to "E," 128 feet, and "C" to "F," 174 feet?

A. Yes, sir.

Q. What is the scale of the map?

A. One inch equals ten feet.

Q. This marked on the southwest corner of 27th Avenue and Cherry Street, "Apartment House?"

A. Yes.

Q. Do you recall—this map does not show the width of the apartment house. Do you remember what that was, or did [28] you measure it?

A. I didn't stop to measure it.

Q. Nor the length of the apartment house?

A. About 92 or 93 feet.

Q. Now here is something marked here, indicating what?

(Testimony of Albro Gardner, Jr.)

A. That is marked in pencil just north of the west end of the apartment house, and indicates a delivery wagon and horse.

Q. That is where I told you the vehicle was standing, that is what that represents? A. Yes.

Q. The lines in the center of Cherry Street indicate the street railway track? A. Yes.

Q. Did you take the measurement from the south track to the curb of Cherry Street?

A. They are all to scale.

Q. What is the distance to the curb on the south side of the street car track? A. Sixteen feet.

Q. What is the width of 27th Avenue?

A. Sixty feet. The paved portion is 25 feet.

Q. That is on the south side of Cherry Street?

A. I may say that the brown, or the dark color, represents the asphalt paving. The red represents the brick paving, which is at the gutter or each side of the four rails of the two tracks.

Q. The white on the south side represents what?

A. The concrete walk, and the white represents the apartment house. [29]

Q. Between the brown and the apartment house is—— A. The parking strip.

Q. Can you give me the width of the parking strip?

A. The parking next to the sidewalk is four feet wide; the concrete walk is six feet; and the inner parking strip two feet, on the south side of Cherry.

Q. Four, six and two? A. Yes, sir.

Q. And what is it on the west side of 27th?

A. That is seven feet and a half; six feet for the

(Testimony of Albro Gardner, Jr.)

concrete walk, and four feet for the inner parking strip.

Q. The point "A" represents what?

A. The spot as pointed out by——

Mr. HAMMOND.—This is merely for the purpose of getting the measurements. Mr. Hunt states that these points are where the accident happened.

Mr. FALKNOR.—Mr. Hunt ought to do that then. You might ask him the measurements from those points, but what those points are I think should be testified to by somebody else.

Mr. HAMMOND.—That is true.

The COURT.—Proceed.

Cross-examination.

Q. (By Mr. FALKNOR.) That I may get this clear, Mr. Gardner, 27th Avenue is paved?

A. Yes.

Q. And the paved portion is 25 feet wide?

A. Yes [30]

Q. And then from the paved sidewalk on the curb line over to the building is how far?

A. Seventeen and one-half feet from the outer edge of the curb.

Q. That is on the east side of the building?

A. Yes.

Q. From the edge of the building to the curb, and then the street is 25 feet?

A. The roadway, yes, sir.

Q. And the same 17½ feet on this side? (Indicating.) A. Yes, sir.

Q. And on the north side of the apartment house,

(Testimony of Albro Gardner, Jr.)

from the apartment house to the curb is 12 feet?

A. Yes.

Q. And from the curb line to the easterly-most rail is 16 feet. A. The southern-most rail.

Q. Which would make from the southerly rail to the house, 28 feet? A. Yes.

Q. Now, from the north edge of the apartment house there is no obstruction on the sidewalk that interferes with the ordinary view across?

A. Just these poles.

Q. Otherwise there is nothing to obstruct one's vision across in this direction?

A. Nothing that is permanent.

Q. Except this pole? A. Yes.

Mr. HAMMOND.—I wish you would indicate on here with a pencil [31] just what these measurements are that you spoke of; between the curb and the sidewalk, the parking strip, on the south side of Cherry Street. (Witness does so.)

A. The red mark is the gutter.

Mr. HAMMOND.—That is all.

Mr. FALKNOR.—That is all.

(Witness excused.) [32]

[Testimony of M. A. Hunt, for Plaintiffs.]

M. A. HUNT, produced as a witness on behalf of the Plaintiffs, being first duly sworn, testifies as follows:

Q. (By Mr. HAMMOND.) State your name?

A. M. A. Hunt.

Mr. HAMMOND.—We are offering in evidence,

(Testimony of M. A. Hunt.)

Your Honor, as Plaintiff's Exhibit No. 2, sections, or parts of Ordinance No. 24,597 of the City of Seattle, with reference to the driving of street cars.

The COURT.—Any objection?

Mr. FALKNOR.—None at all.

Mr. HAMMOND.—Section 15 of that ordinance provides that no driver shall propel or cause to be propelled any street car within the business or settled residential districts at a speed exceeding twelve miles per hour. That is an ordinance of the city of Seattle.

The COURT.—It may be marked.

(Ordinance received in evidence and marked "Plaintiff's Exhibit No. 2.")

Q. You are the plaintiff in this case, Mr. Hunt?

A. Yes.

Q. How old are you? A. Forty-five years old.

Q. Where do you reside?

A. 1330 Eighth Avenue.

Q. Your wife's name is what?

A. Mary A. Hunt.

Q. What is your business, what is your trade?

A. My trade is a barber.

Q. How long have you been engaged in that business? [33] A. Off and on for 28 or 30 years.

Q. Do you recall the accident that happened out at 27th Avenue and Cherry Street on the 23d day of last September, in which the street car and your automobile collided? A. Yes, sir.

Q. I wish you would tell the jury the circumstances under which that accident happened?

(Testimony of M. A. Hunt.)

A. I was going down 27th Avenue from the south and entering in the block on 27th Avenue I proceeded down towards Cherry, East Cherry Street. As I got nearly down to the block I slowed the machine down for the purpose of crossing the street, and as I entered the block, as soon as I could see, I saw a street car coming at a very rapid rate of speed.

Q. Being as you entered the block or the street?

A. Entered the street. And I could not get across in front of the car—the street car was coming so rapidly that it did not seem that I could cross in front of the car, and I could not turn to my right without going out into the car track. The only thing was to turn my wheel to the left, which I did, and I stopped before I got past the left hand curb. I stopped my machine. I was not on the track, but I was near the track, and in turning the car the right hand wheel of the automobile projected farther than any other part of the automobile. The rubber tire of the automobile was struck first—that gave me my first jar—with the front end of the street car—it threw the wheel out of my hands and threw the right hand fender directly in the center of the front door of the street car, and it scraped along until it [34] came to the front box of the rear truck of the street car, which then struck either—I think my frame of the automobile, and pushed us back so that the rest of the street car didn't hit us at all, went on without any scratches on the street car.

Q. Now, I wish you would come here to this map and indicate to the jury where you were in your best

(Testimony of M. A. Hunt.)

judgment when you first saw the street car?

A. I was on a line with the curb at the point "A."

Q. And then where would the front end of your automobile have been? A. Nine feet ahead of it.

Q. And where is that as indicated on this map?

A. "B."

Q. Then when you first saw the street car coming you were seated at the point "A," practically speaking, and the front of your automobile would be at the point "B"? A. Yes, sir.

Q. Where, as near as you can state, was the street car that was coming down toward you from the west on Cherry Street, about where?

A. Well, about 150 feet, or 175 feet.

Q. Can you point about where it was on the map on Cherry Street? "C" to "D" is 180 feet. Where was it between the point "C" and the point "B," as indicated, that you were about the first time you saw the street car, as you recall it?

A. Near the point "B."

Q. And state where your car was when it came to a stop, after you saw the street car? [35]

A. About the point "C."

Q. Where did the street car stop after it struck you?

A. Between the hydrant across the street here, and the telephone pole, was the back end of the car.

Q. The point marked what? A. "E."

Q. And the front of the car would be about where?

A. About the point "F." It was a 46 foot car.

(Testimony of M. A. Hunt.)

Q. Did you afterwards measure the car or look at it? A. I did.

Q. Where was the cover to the boxing of the rear axle picked up that was knocked off of the street car by the impact?

A. I think about this point here. (Indicating.)

Q. That would be almost on a line with the pole?

A. I think a little inside of the line.

Q. On the west side of 27th Avenue, the place marked "pole" on the west side of 27th Avenue, and the south side of Cherry Street, on a line with that point marked "pole," you think, or a little west or east, which?

A. I think it is a little west of that point.

Q. On which side of the south side of the street car tracks—I mean on which side of the south rail of the street car tracks was it picked up?

A. On the right hand side.

Q. I mean on the north or south side?

A. On the south side.

Q. The south side of the south track of the street car? A. Yes, sir.

Q. Who was with you in the car?

A. Mr. Bevington. [36]

Q. Where was he seated? A. At my left.

Q. In the front or rear seat?

A. The front seat.

Q. Was there any obstruction on your left-hand side that would obstruct your view to the westward other than the brick apartment house on the southwest corner of 27th and Cherry?

(Testimony of M. A. Hunt.)

A. There was a covered wagon and team in there, a delivery wagon.

Q. You say it was a covered wagon? A. Yes.

Q. By that you mean that it was high with a cover over it, or something laid over the bottom of the wagon?

A. No, a high cover, a canopy over the driver's seat.

Q. Do you remember about where that was located, as near as you can recall?

A. Some where in this line right in here. (Indicating.) I could not be certain as to the exact point, but it was in this line here.

Q. And state whether or not that obstructed your view of any street car that might be coming?

A. I could not see any car or anything until I got by this line; being seated down lower I could not see the street car until I got by the line of this team.

Q. You were unable, then, to see across, as I understand it, prior to the time you got out here on a line, you think with this curve? (Indicating.)

A. To the point I could see it?

Q. Why could you not see it from right in here? (Indicating.) [37]

A. I could not see it back in this point here on account of this team.

Q. Now, tell the jury how long you had been driving an automobile up to that time?

A. Well, I had driven an automobile quite a little.

Q. What do you mean by quite a little?

A. Enough so that I understood—enough so I

(Testimony of M. A. Hunt.)

could understand the operation of the machine.

Q. How much was that?

A. Well, I had driven—

Q. (Interrupting.) About how many months had you been driving this car, how long had you had it?

A. Why, I think six or seven weeks is all.

Q. Now, had you ever driven—was it a new car?

A. A new car, yes, sir.

Q. Just out of the shop? A. Yes.

Q. Had you ever driven any other car?

A. Yes.

Q. When, and how long before?

A. Six months previous to that.

Q. Do you remember the make of the car?

A. I had driven a Mitchell, and a Winton too.

Q. On this particular day, as you came up 27th Avenue here, what had you been doing as to testing the speed of the car, or demonstrating it for Mr. Bevington's benefit?

A. Back a couple of blocks I was demonstrating how low the machine could be throttled down, to a mile or two miles an hour, and how quickly it would gain speed to twenty miles an hour, and at no time did my speedometer show [38] to exceed twenty-two miles from Yesler Way over to that point. When I entered the block, that block, proceeding down to Cherry Street, I was not running to exceed fifteen miles, when I entered the block.

Q. Well, now, as you came down this way, state whether or not you slowed the car down?

A. I slowed the car down with my foot brake.

(Testimony of M. A. Hunt.)

Q. Now, then, about how fast were you going when you reached the point "A"?

A. I don't think I was running eight miles.

Q. Your intention when you got to the point "A" was to go where, where were you going?

A. I was going to go across the tracks and turn and go down west.

Q. And from the time you saw the car at "A" until you succeeded in bringing it to a stop what was necessary for you to do in order to bring it to a stop, put on your emergency brake?

A. I put on my emergency brake simply because the foot brake would not stop it dead still in that space I had to stop in.

Q. From the time you saw the car until you could stop it about what interval of time would elapse before you could reach down and get your emergency brake, or bring it to a stop?

A. The first thing I had to do after I saw the car—I decided I could not get in front of it—I had to turn with both hands the wheel to the left. That took a little space of time. Then I immediately reached for the emergency brake and closed it down as quickly as I could.

Q. At the time you saw the street car coming at about what [39] rate of speed do you think the car was coming?

A. It looked to me to be coming pretty fast. In looking at the car it widened out to me like this (indicating), showing that it was coming very swift. I judge 30 to 35 miles an hour.

Q. When you saw it coming? A. Yes.

(Testimony of M. A. Hunt.)

Q. It had passed 26th Avenue?

A. It had passed 26th Avenue. It didn't stop at 26th Avenue, I don't think.

Mr. FALKNOR.—If you don't know I move that the answer be stricken.

Q. You don't know anything about that, do you?

A. I don't know. I didn't see it.

Q. After the car had struck you, you say that the wheels were turned around so that the right fender of the car was thrown into the street car?

A. The wheels was turned to the left. The wheels were over to the left as far as they could go, leaving the rubber tire projecting further than any other part of the automobile. I thought I had missed the car. I thought I was far enough away so that the car would not hit me, but the very front end of the street car, where the frame comes around, struck the rubber tire, and threw it into the door, the front door.

(Whereupon the Court takes a recess until 2:00 o'clock, P. M.) [40]

September 24, 1914; 2:00 o'clock, P. M. Continuation of proceedings pursuant to recess. All parties present as at former hearing. Jury polled—all present.

M. A. HUNT, on the witness stand for further direct examination.

Q. (By Mr. HAMMOND.) Mr. Hunt, I would like to have you, in order to fix it definitely, as nearly as you can, have you tell the jury when you were at the point "A," as shown on Plaintiff's Exhibit No. 1, about where the street car was that struck your auto-

(Testimony of M. A. Hunt.)

mobile. You come down and indicate, please?

A. I could just see it by the team.

Q. The team that is indicated here?

A. Yes. I don't know whether the team stood right at that point, but right where the team stood.

Q. You saw it just coming—

Mr. FALKNOR.—(Interrupting.) Don't lead the witness.

A. I saw it coming just by the team.

Q. Now, you don't know—state if you know about where that was, if you can do so, as near as you can?

A. Well, the team was between the back entrance and this entrance. (Indicating.)

Q. This entrance here into the apartment?

A. Yes, and possibly in here somewhere is where I could see the street car.

Q. Somewhere between the point "C" and the point "D"? A. Yes.

Q. Not further back than the point "D"? [41]

A. Not further back than the point "D."

Q. How large a car were you driving?

A. A Hudson six cylinder, 6-4 horse power.

Q. What was the length of it?

A. About 15½ feet.

Q. What was the weight of it?

A. 3980 pounds.

Q. What was the length of the car—what was the distance, rather, between the point where you were sitting and the fender, the front end of the fender, the front fender? A. About nine feet.

Q. About nine feet, you say—have you measured

(Testimony of M. A. Hunt.)

it, do you know what it is?

A. Yes. I have measured it, but they vary a little bit, an inch or two.

Q. The two fenders?

A. Yes, the two different fenders.

Q. It wont be an inch or two off either way?

A. No, about nine feet.

Q. Have you any idea as to the length of the time that elapsed between the time that your car—between the time you saw the street car and the time it struck you, struck your car?

A. Well, to my best judgment, oh, probably four seconds.

Q. That is, from the time you first saw it—

Mr. FALKNOR.—Just a minute, I object to the witness being led.

Q. I will ask you to state whether or not that is from the time you first saw it, or some other time?

A. That is from the time I first saw the street car, about four seconds until it hit me. [42]

Q. And I wish you would state whether or not, prior to the time the street car struck your automobile, you heard the ringing of any bell or gong, or other noise made by the street car?

A. No, I did not.

Q. I wish you would state to the jury the effect upon your automobile that the—I withdraw that question. Tell the jury how your automobile was damaged by this street car running into it.

Mr. FALKNOR.—I object unless it is for the purpose of showing the amount of impact. If it is for

(Testimony of M. A. Hunt.)

the purpose of showing the damage to the car for the purpose of recovery I object to it because under the pleadings he is clearly shown not to be entitled to recover for any damage to the car.

(Question read to the Court.)

The COURT.—What is the purpose, Mr. Hammond?

Mr. HAMMOND.—Well, there are two purposes. One purpose is to show the effect of this street car hitting the automobile. That is, the idea being that if the car was damaged, bent or broken, why we assume that they were evidently coming at a high rate of speed. The other idea is that he is entitled to recover for damages to his automobile.

The COURT.—What have you to say, Mr. Falknor, about the damage to the automobile?

Mr. FALKNOR.—Here is the situation as to the automobile. It is conceded, so far as the pleadings are concerned, that he held the automobile under a conditional bill of sale, and the title did not pass, but remained in the vendor. [43] He didn't pay for the improvements; he didn't pay for any of the repairs. The automobile was taken back. Now, if I might briefly give my idea on this subject, it is this; He paid \$400 on the contract. He did not pay for any of the repairs or any of the improvements. He made none of the subsequent payments. After this accident he never had possession of the car further than to take it to the garage. The vendor took possession of the car and made the improvements. Now, the only damage that he could possibly have

(Testimony of M. A. Hunt.)

sustained, Your Honor, would be the loss of the \$400. He can not sue for that. He is suing for the damage to the car, but the car never was his. He never paid for the damage. It was taken back by the vendor. Now, would Your Honor say that I may have an automobile under a conditional bill of sale, one for which I, for instance, may have paid one dollar, and took it out and it is damaged to the extent of one thousand dollars, the vendor takes it back and pays for the improvements, I surrender my car, would Your Honor say I could recover for damages to the car? I am not out anything.

The COURT.—You could not recover one thousand dollars.

Mr. FALKNOR.—I could not recover. The only thing I could recover, your Honor, would be, frankly, such an amount as would be the difference between what I had paid, \$400, and the use of the car for six weeks. If the use of the car for six weeks was worth \$400, then I am not out anything, am I? Now, they sue in this case, Your Honor, in the complaint for the damages to the car. Then we set up, Your Honor, that they did not own the car, and they admit it. That puts them clearly outside of the [44] question of damages to the car, because certainly a man cannot recover anything he didn't pay. He cannot recover anything he is not obliged to pay. He is not obligated to pay these repairs. He did not pay, even. Can he come into Court and recover? Certainly not. That could not be the law. I said that this might be competent as bearing upon the ex-

(Testimony of M. A. Hunt.)

tent of the impact, but upon the question of damages to the car, he never paid the damages, and is not obligated to pay them, because the car went back to the vendor and was surrendered.

Mr. HAMMOND.—It occurs to me that that is all a question of instruction by the Court to the jury. Certainly counsel would not contend for a moment if I bought an automobile, bought it upon a contract and paid \$400 down, as Mr. Hunt did in this case, and I was using that in a business of any kind, and under the contract in this case he had the right as part of the agreement to use the automobile, and then the automobile gets damaged by the Seattle Electric Company, and I go ahead and pay out—I haven't paid just the \$400, but I go ahead and pay out my contract, would the Seattle Electric Company be heard to say that I could not recover damages to the automobile. It is mine while I have it. I have the right to possession of that car.

Mr. FALKNOR.—I will concede, Your Honor, that if he paid out on the contract, and made these repairs, or became obligated—

The COURT.—I understand you.

Mr. HAMMOND.—Now, it occurs to me that in in this case we are [45] entitled to show the damage to this car. Now, then, if we do not in our evidence prove that we are entitled to recover for the damage we are trying to prove, your Honor will certainly take it away from the jury.

The COURT.—I have the idea of both of you now. I think the objection should be overruled irrespective

(Testimony of M. A. Hunt.)

of what the conclusion may be as to the right of recovery for the damage to the car. Note an exception.

(Exception noted for Defendant.)

(Question repeated to the witness as follows:)

Q. Tell the jury how your automobile was damaged by this street car running into it?

Mr FALKNOR.—I object to that as suggestive and leading, Your Honor. I further object because it is suggestive and leading.

The COURT.—Objection overruled.

Mr. FALKNOR.—Exception.

A. The right wheel.

Q. Which, front or rear?

A. The front right wheel, the tire, steering gear.

Q. Just as you go along; the front right wheel, what was the damage to that?

A. It was broken, had to be replaced.

Q. The wheel was broken and had to be replaced?

A. Yes.

Q. What other part of the car?

A. The tire and the rim.

Q. The rubber tire, you are speaking of now?

A. Yes.

Q. How was that damaged?

A. Torn and broken. [46]

Q. What else? A. The right fender.

Q. How was that damaged?

A. Doubled all up, and broken.

Q. Back?

A. Clear back. Also the right running board.

Q. How was that damaged?

(Testimony of M. A. Hunt.)

A. That was bent up in the center, broken in two.

Q. How else was the car damaged?

A. The steering gear was broken.

Q. In what way? Broken, you say? A. Yes.

Q. Whereabouts?

A. Both sides, both knuckles.

Q. What else was damaged? A. The axle.

Q. How was the axle damaged?

A. It was bent and broken; had to be replaced.

Q. How large is that axle, how big around?

A. I don't know, I could not give the number of inches.

Q. Is it a little thin, round piece of steel, or a big piece of iron, or steel; have you any idea what the axle looks like.

A. I think it is about two and one-half inches thick in the rear axle, and running down to an inch and a half front, possibly. It is nine or ten inches long. I don't know the dimensions of it.

Q. How was that damaged? Bent, you say? Which way?

A. It was sprung under, out of shape.

Q. What other damage was done to the car? [47]

A. The frame, the whole frame that runs clear through the car, that was bent right around, necessitating a new frame. I have a list of the parts that were put in.

Q. An entirely new frame? A. Yes.

Q. You have a list?

A. Of the parts that were put in.

Q. Where is it? A. In my pocket.

(Testimony of M. A. Hunt.)

Q. Look at it and refresh your memory if you need it at all.

Mr. FALKNOR.—Did he make up this list himself, or was it handed to him?

The WITNESS.—The Pacific Car Company did it.

Mr. FALKNOR.—I object to it as hearsay.

Q. What other damage was done to your car?

Mr. FALKNOR.—I object to his reading from that statement unless he knows of his own knowledge.

The COURT.—Yes.

Q. Do you know whether that list is correct?

A. I know it is correct as to the things put in there.

Q. How do you know it is correct? Have you examined it and compared it with the car so that you know what was broken on the car?

A. Yes. They are not all on here either.

Q. Tell what you know, anyhow, about what was damaged. What other damage was done to the car of any consequence. I am not speaking of the little——

A. (Interrupting) The right headlight broken.

Q. What else of any consequence?

A. I have enumerated the larger things now. [48]

Q. I wish you would tell the jury what the value of the repairing of the car was?

Mr. FALKNOR.—I object to that as immaterial under the pleadings in this case. This man has no interest in the repairs. He neither paid for them nor obligated himself to pay for them. He didn't

(Testimony of M. A. Hunt.)

own the car. The car was taken back by the vendor, who made the repairs and paid for them. Certainly a man can not recover something that he neither paid for nor is obligated to pay for.

The COURT.—He may answer the question.

Mr. FALKNOR.—Exception.

(Exception noted for defendant.)

(Question repeated to the witness.)

Q. How much money?

A. The absolute parts charged to me by the Pacific Car Company that they put in was \$321.90.

Q. 321.90?

A. I have their bill here as charged.

Q. Does that include all the damage to the car that you have spoken of, the three hundred and ninety some odd dollars?

A. There was some things they didn't pull in, a couple of tires.

Q. What was the value of those tires?

A. I suppose about \$48 apiece.

Q. What was that other amount you said?

A. 321.90.

Q. What particular business were you engaged in, using this car in at the time that it was damaged?

A. I had it on the rent.

Q. You mean you had it for hire upon the streets of Seattle? [49] A. I had it for hire.

Q. Where were you standing with the car?

A. In the street on Third Avenue, between Pike and Union.

Q. Do you know what the earning capacity of the

(Testimony of M. A. Hunt.)

car was during this time?

A. I think it was about 37 days, seven hundred and some dollars. I don't remember the amount.

Q. What was that?

A. Seven hundred and some dollars. I don't remember the exact amount.

Q. How many days? A. Thirty-seven days.

Q. What do you mean by that?

A. The amount of money taken in on the car.

Q. Well, you figured that as being—does that include your own time on the car—how do you figure that, how do you arrive at that figure?

A. I had a man working on the car nights, and I worked on it part of the day myself, and the amount taken in was close to eight hundred dollars. I cannot give you the exact number of days, 32 or 37 days, I don't know which.

Q. How many days was it, Mr. Hunt, that the car was being repaired?

Mr. FALKNOR.—I object to that as immaterial. The car was surrendered to the vendor and no further payments made.

The COURT.—Objection sustained beyond the time when it was surrendered.

Mr. HAMMOND.—We will prove, your Honor, the length of time that under the contract he had the use of that car.

The COURT.—Then limit your question to that.
[50]

Mr. HAMMOND.—I want to prove by him now,

(Testimony of M. A. Hunt.)

your Honor, the number of days before he could have taken the car back.

The COURT.—The objection is sustained to the question as propounded.

Q. How many days, Mr. Hunt, was it before the car was ready to be used upon the rental business, after the injury?

A. I don't know exactly the number of days just now. I cannot remember, but about a month, I think.

Q. Not less than a month?

A. I don't know. I can't remember.

Q. When was it the car was taken back from you by the Pacific Car people, who had sold you the car?

A. The 5th day of February.

Q. The 5th day of February, 1914? A. 1914.

Q. Was there any payment of any kind due upon the car when the accident happened?

A. There was not.

Q. When was the next payment due upon the car?

A. The 5th day of October.

Q. 1913? A. 1913.

Q. How much per day was the value of the use of that car upon the renting? A. About ten dollars.

Q. About ten dollars per day? A. Yes, sir.

Q. That includes your own services?

A. No, sir.

Q. What were your services worth? [51]

A. They run about \$15 a day.

Q. In addition to driving the car yourself you say you had a man hired who ran the car at night?

(Testimony of M. A. Hunt.)

A. At night.

Q. How much had you paid upon the car at the time of the accident? A. Four hundred dollars.

Q. Why didn't you make the other payments upon the car when they became due?

Mr. FALKNOR.—I object as immaterial. Your Honor, why he didn't.

The COURT.—Objection sustained.

Q. Was the bill for the damage to the car presented to you by the Pacific Car Company?

A. Yes, sir.

Q. Now, I wish you would tell the jury what effect the impact of the street-car with your automobile had upon you physically. Where were you injured?

A. I was injured across the right side and abdomen, and the back, and back of the neck.

Q. Were you in bed any length of time?

A. Well, I was in bed off and on for about a month.

Q. At the time of the accident did you go home in a street car, or how did you go home?

A. I went up to the Pacific Car Company with the manager and one of the men first with the car.

Q. With your car? A. Yes.

Q. When did you first notice the effects of this accident, that day, or the next day, or the next day, or when? A. That evening. [52]

Q. What did you notice particularly serious that evening?

A. I felt some pain and some shaking up, the breath knocked out of me and things like that at the time, but I didn't think I was hurt very badly. Of

(Testimony of M. A. Hunt.)

course I was excited at the time, but Mr. Crosby, that is the demonstrator of the Pacific Car Company, took me over on the 27th Avenue where I left my wife in the morning, and I stayed there until I suppose possibly eight o'clock, and I got to feeling worse and worse, and finally went home. I don't know what time, half past eight or nine, I don't remember what time it was. We left where my wife was about eight or half past eight and went home, and I went to bed right away.

Q. That night?

A. Yes. My wife wanted me to call a doctor at that time, but I said no, I would be all right, I thought.

Q. Did you subsequently have a doctor called?

A. I don't know what time she called the doctor. I am sure I could not tell you that.

Q. Was it that night, or you don't know?

A. I don't know.

Q. Were you delirious during any of the time?

A. Well, part of the time for five or six days I can remember some of the things that happened, and some I cannot.

Q. How many days were you in bed, do you remember?

A. I was in bed most of the time, I was in bed all of the time for five or six days.

Q. Continuously after that night when you went to bed you were in bed? A. Yes. [53]

Q. Did you go down to the Pacific Car Company the next day? A. I did not.

(Testimony of M. A. Hunt.)

Q. Were you out of the house, as you remember, up to the first five days?

A. No, sir, I was not out of the flat.

Q. Who was the doctor that was waiting upon you? A. Dr. Warren Richardson.

Q. You are by profession or trade, I understand, a barber? A. Yes.

Q. Did you, after this accident, go back to work at your trade at any time, and if so about when and what did you do?

A. I tried to work about the first of March some time, maybe a little later than the first of March, I worked part of the time at my trade.

Q. What do you mean by part of the time?

A. Five or six hours a day, three hours in the forenoon and three hours in the afternoon.

Q. What would be whole time?

A. A full ten hours would be whole time.

Q. During the time you were working did you notice any effects, did you have any headaches or nervousness or any troubles of that kind? If so state what they were.

A. At times I got so nervous I would have to call somebody else to finish the man, and go and sit down. At times I have been so nervous that in trying to do the work the razor would fall out of my hands onto the floor.

Q. Prior to this time had you ever had any illness of any kind, prior to the accident; if so, tell the jury.

A. In what length of time? [54]

Q. Oh, a year, or two years, or three years.

(Testimony of M. A. Hunt.)

A. No, not to amount to anything.

Q. Were you in good health on the day of the accident? A. Excellent health.

Q. And since then were there any other symptoms or effects; if so I wish you would tell the jury what they are.

A. When I even travel down the street I get exhausted. To do any little thing, it exhausts me.

Q. Now even?

A. Even yet, and any mental work or calculation—it is pretty hard for me to calculate without getting muddled. I have a depressed sort of feeling. The top of my head seems like something was heavy on top of my head; when I get tired, especially.

Q. During the time you were ill did you have any nurses, or who waited on you?

A. My wife waited on me.

Q. Now, I wish you would state whether there was any injury to your ribs at all.

A. They hurt me down on my right side. The doctor bandaged them up. As to how big an injury, I could not tell.

Q. When did he bandage them up, that night?

A. I am sure I don't know whether it was that night or the next morning, or when it was.

Q. Now, the injury to your back, I wish you would tell the jury how long that lasted, and how it felt; was it painful or just a mere ordinary ache or something; tell the jury how it felt.

A. It differed, sometimes a hard day, and other times just a dull ache. That is, after the side got

(Testimony of M. A. Hunt.)

better it didn't [55] hurt me so badly, but when the side was still lame it hurt a great deal more than in the back.

Q. Now, you say you think it was in March that you went to work on half time, or part time?

A. Yes.

Q. Prior to this time they had taken your automobile away from you, the company had taken it back because you were not able to make the repairs?

A. Yes.

Q. How long did you continue to work on this half time or part time?

A. Oh, I think about five or six weeks.

Q. Well, then, what did you do, did you go to work whole time or quit, or what did you do?

A. Oh, I got to feeling much worse again, nervous, I could not work. I quit and went over to Vashon Island on a ranch and stayed there for six weeks or so.

Q. Have you been working since you came back?

A. I have been working part time since I came back.

Q. And you are now working whole time or part time?

A. I am working part time. Of course not this week.

Q. Since the injury, if I understand you rightly—I wish you would state, rather, whether since the injury you have been able to work whole time or at all.

A. I have not.

Q. About how much time since the injury have you worked altogether?

(Testimony of M. A. Hunt.)

A. Oh, I don't know. Ten or twelve weeks part time.

Q. What is your earning capacity, Mr. Hunt, as a barber when you are working at full time? [56]

A. Well, I have never made, working at full time, less than \$125, and from that to \$140 a month.

Q. I wish you would tell the jury a little more fully about the extent of your headaches; were those headaches once a week or once a day or once a month, or tell them how often you have them.

A. Every morning when I would awake I was not any more rested than when I went to bed. In fact, I didn't sleep very much. I always had the headache in the morning, and do yet, for that matter.

Q. Have you stated whether or not you worried about your condition?

Mr. FALKNOR.—Oh, I object to that as immaterial.

The COURT.—Oh, yes, I think whether he worried or not is immaterial.

Q. What have you expended or become obligated to expend for services of a physician in connection with this injury? A. Oh, I suppose about \$75.

Q. Have you expended any money for medicines or other— A. About ten dollars.

Q. What do you estimate, Mr. Hunt, is the—how much did you weigh physically before this accident?

A. 177½ pounds.

Q. What have you weighed since?

A. Oh, I have weighed 152. I weigh 162 now.

Q. Have you been out to the place where this acci-

(Testimony of M. A. Hunt.)

dent happened recently? A. Yes, sir.

Q. I wish you would tell the jury about how thickly populated that is in that community. [57]

A. Well, along 27th Avenue most of the lots are filled with houses on the left-hand side. There is not so many on the other side.

Q. There is a school how far from there?

A. There is a school, I think, a couple of blocks from there.

Q. What is the size of that apartment house, how many stories? A. Three stories.

Q. You have been in there, have you; do you know how many apartments there are? A. I do not.

Q. You say this is a rather thickly populated part of the city? A. Yes.

Q. At the time the car was delivered to you you were to keep the car in repair, were you?

Mr. FALKNER.—I object. The contract speaks for itself.

The COURT.—Yes.

Q. I hand you a piece of paper here and ask you whether or not that is the agreement signed by the Pacific Car Company with you? A. It is a copy.

Q. It is a duplicate copy?

A. This is a duplicate copy, yes, sir.

Mr. HAMMOND.—I would like to have it marked "Plaintiff's Exhibit No. 3," I think it is, for identification.

The COURT.—Let the clerk mark it.

(Document marked for identification as "Plaintiffs' Exhibit No. 3.")

Q. That is the contract under which you held the

(Testimony of M. A. Hunt.)

car, is it not? A. Yes, sir. [58]

Mr. HAMMOND.—We offer it in evidence.

Mr. FALKNOR.—No objection.

The COURT.—It will be admitted.

(Document received in evidence and marked
“Plaintiff’s Exhibit No. 3.”)

Q. Under that contract you were to have the use of the car during the time—at all times while it was in your possession, were you not? A. Yes.

Q. And were to keep it in repair?

A. Yes, sir.

Q. There was no payment due, as I understood you to say at the time of this accident?

A. No, there was no payment due at the time of the accident.

Q. And they did not take it away from you until the 5th day of the next February? A. Yes.

Q. I wish you would state what that is, Mr. Hunt.
(Hands document to witness.)

A. This is a form of note.

Q. That is the note? A. Yes.

Mr. HAMMOND.—It is marked “Plaintiffs’ Exhibit No. 4 for identification.” We offer it in evidence.

Mr. FALKNOR.—It is wholly immaterial, your Honor.

The COURT.—It may be admitted.

(Exception noted for defendant.)

(Document received in evidence and marked
“Plaintiffs’ Exhibit No. 4.”)

Mr. HAMMOND.—That is all. [59]

(Testimony of M. A. Hunt.)

Cross-examination.

Q. (By Mr. FALKNOR.) Mr. Hunt, I understand that you have pursued your calling of barber for something like 28 or 30 years?

A. Yes, about that time.

Q. That has been your life work?

A. Well, I haven't done it all the time.

Q. I know, but that has been your general life work?

A. That has been my trade when I was not doing something else.

Q. I understood you to tell the jury that you had pursued it for 28 or 30 years? A. Off and on.

Q. Did you say anything about off and on when they asked you how long you had been a barber, on direct examination?

A. I should have to answer that I had been a barber that long.

Q. You said you had been a barber for 28 or 30 years. You didn't say anything about being a barber off and on. Well, now, this was a Hudson car?

A. Yes, sir.

Q. You got it from the Pacific Car Company on about the 5th day of August, didn't you?

A. About the 5th day of August.

Q. Last year?

A. The contract was made. I didn't receive the car quite so quick as that.

Q. You had never driven a Hudson before that?

A. No. Not any distance. [60]

Q. Now, about a week previous to this accident

(Testimony of M. A. Hunt.)

you had another accident where you ran into a wagon with a woman in it along the road down here at Puyallup, and upset the wagon, didn't you; about a week previous to this accident?

A. No, I did not.

Q. Didn't you have an accident in Puyallup where you upset a wagon with a woman?

Mr. HAMMOND.—I object—

Mr. FALKNOR.—Bearing upon the question of the competency of the driver, your Honor.

The COURT.—He may answer.

Q. Didn't you run into a wagon?

A. Not a week before.

Q. How many days before? A. Well—

Q. Eight or nine days, or ten days; I said about a week before? A. More than that.

Q. Well, how many days more than that?

A. I would have to refer to my memory.

Q. Well, it was about ten days or a week before this other accident? A. More than that.

Q. Just how many days, then; it could not have been very many days more than that?

A. I think it was about the 29th of August.

Q. On about the 29th of August. Very well; you remember the date? A. I am not sure.

Q. On this date in question you had Mr. Bevington with you, [61] didn't you? A. On what day?

Q. On this day in question, the day you had your accident out here with the street car, you had Mr. Bevington with you?

A. He was in the wreck with me.

(Testimony of M. A. Hunt.)

Q. And about two blocks before the accident you were showing him how slow you could run?

A. More than that.

Q. Didn't you tell the jury about two blocks before the accident you were showing him how slow you could run?

A. Possibly about two or three blocks.

Q. Then you were showing him what you could do with your car? A. I was demonstrating it.

Q. And after you showed him how slow you could run, then you showed him how fast you could run?

A. I showed him how fast I could run first.

Q. After you showed him how slow, didn't you speed her up again and show how fast you could run?

A. No.

Q. How fast did you show him you could run on the streets of the city of Seattle?

A. About twenty miles.

Q. Didn't you show him you could run faster than twenty miles on the paved streets?

A. I was not trying to show him the rate of speed I could run; it was how quick the car could pick up from nothing to a certain speed.

Q. When you come within a block of East Cherry Street it is paved, isn't it? [62] A. Yes.

Q. How fast did you take you car down the block?

A. Entering into the block?

Q. Yes. A. About fifteen miles.

Q. About fifteen miles. Did you see anybody in the street? A. In Cherry Street?

Q. Yes, and in 27th Avenue?

(Testimony of M. A. Hunt.)

A. I saw people in Cherry Street, automobiles running back and forth.

Q. Did you see anybody on 27th Avenue in that block, when you came down through at fifteen miles an hour?

A. I think there was people along the block. I would not be certain.

Q. Did you see anybody in the street.

A. I don't remember.

Q. You don't remember. Now, as a matter of fact, did you see the street sweeper there in the street, or did you bring your car down so fast that you could not see him?

A. No, it was not a matter that I could not see; I don't think I saw any—

Q. As a matter of fact, you brought your car down so fast that you could not see him; you brought your car down that block at not less than 25 miles an hour, isn't that true? A. No, that is not a fact.

Q. How quickly can you stop your car going at eight miles an hour? A. How quickly?

Q. Yes. Is it up grade or down grade on 27th Avenue? [63] A. Down grade.

Q. About level, isn't it? A. No, down grade.

Q. How much down grade?

A. Well, I could not quite state.

Q. When you turn in on East Cherry Street is it up or down grade, or level?

A. Well, about level.

Q. How quick could you stop that car at eight miles an hour on the level? Eight miles an hour is

(Testimony of M. A. Hunt.)

awful slow when you look at the speedometer.

A. How quick can I stop it?

Q. How quick can you stop that car? Your emergency brake and foot brake were all right, your clutch was all right?

A. After you get the brake—

Q. (Interrupting.) Your brakes were all right?

A. Yes.

Q. How quickly could you stop that car going at eight miles an hour?

A. I suppose I could stop it in twelve feet.

Q. Four feet? A. Twelve feet.

Q. Would it skid any when you would stop in twelve feet? A. No.

Q. Will you tell the jury, then, if there was skid marks showing that the car skidded fifteen or twenty feet, where it skidded fifteen or twenty feet—

Mr. HAMMOND.—If the Court please, there is no evidence that it skidded.

Mr. FALKNOR.—I am assuming that there would be evidence. [64]

Q. If there was evidence showing that your car skidded fifteen or twenty feet, wouldn't that indicate that you were going at a very much greater rate of speed than eight miles an hour?

A. There are no skids there.

Q. If there were skid marks there after the accident showing that your car had skidded fifteen or twenty feet, would you still tell the jury that you were not going more than eight miles an hour?

A. I don't claim that I was not running more than

(Testimony of M. A. Hunt.)

eight miles back up the street.

Q. I am saying when you made the turn into East Cherry Street, when you say you were stopping, if your car skidded fifteen or twenty feet, do you mean to tell the jury you were only going eight miles an hour?

A. You couldn't possibly skid twelve or fifteen feet.

Q. If your car skidded fifteen feet at that place that would indicate what speed you would be going?

A. Fifteen feet?

Q. Yes. Twenty-five miles an hour, wouldn't it?

A. Well, on a dry track you couldn't skid a car fifteen feet going twenty miles an hour.

Q. Well, it would indicate that you were going at a high rate of speed if your car skidded that far, wouldn't it? A. Yes, if it skidded.

Q. If it skidded, yes. Now, when did you look for the street car when you came out on East Cherry Street, when did you first look for a car?

A. As quick as I could see.

Q. As quick as you could see; then as soon as you could [65] look down over the sidewalk you could look for the street-car. As soon as you got in that position (indicating on Plaintiff's Exhibit No. 1)—did you come up the center of the street, or did you observe the ordinance and keep on the right hand side of 27th Avenue? A. I was right in the center.

Q. Then you were over here on the right-hand side? A. Not clear over to the curb.

Q. Well, like that? (Indicating.)

(Testimony of M. A. Hunt.)

A. My left wheel was just off the center.

Q. Then as quick as your vision would come down here you looked for the street-car, that is your idea?

A. There was no obstruction.

Q. There was no obstruction between the corner of the house and the street-car track that obstructed your vision, was there?

A. No. Only the telegraph pole.

Q. A telephone pole didn't conceal a street-car, did it? A. No.

Q. Then the moment that your vision got by the corner of this building you began to look for a street-car? No particularly a street-car; anything.

Q. And then your vision kept on following that around, turned as your car proceeded, like that, is that right? You kept on looking for street-cars, did you, or vehicles? A. Oh, I looked both ways.

Q. Why didn't you see that street-car?

A. I couldn't see it any quicker than I did.

Q. You couldn't see it any quicker than you did; why?

A. My view was obstructed. Being seated in the automobile, I [66] could not see the street-car until it came by the team or came into view by the team.

Q. Do you mean to tell the jury that this one team down here, standing next to the curb, obstructed your view of that great big street-car?

A. It obstructed my view of the street-car until I could see by it.

Q. Was the team and the wagon so big you could

(Testimony of M. A. Hunt.)

not see the street-car above it or below it or behind it, or in front of it?

A. I could not see it until I could get a vision by the team.

Q. You say that this one team standing down here obstructed your view of the whole big street-car?

A. It was not only the team, it was a high, covered wagon.

Q. Whatever it was it was a delivery wagon, wasn't it? This delivery wagon obstructed your view of that street-car? A. It did.

Q. You tell the jury that you could not see that street-car by that wagon? You come down here and tell me where this—make a point on this map here where this street-car was when you say you were at “A,” will you?

A. I could not give the exact point.

Q. Your counsel had you guess, now guess a little for me. Do you say you did not see the street-car until you were at “A,” and the front of the car was at “B,” and the distance between you and “B” is the distance between the seat and the front end of the car is nine feet? Isn't that rather long?

A. It is about right. [67]

Q. Is it nine feet from where you sit to the front end? A. Just about.

Q. Did you measure it? A. I did.

Q. For the purpose of this suit, or are you guessing? A. I measured it.

Q. When did you measure it?

A. I cannot tell you exactly.

(Testimony of M. A. Hunt.)

Q. Very well. Now, when you were at "A" you tell me where this street-car was. You said in your direct examination it was back 180 feet; is that right? A. 150 to 175 feet.

Q. Now, then, tell me where it was?

A. I should say it was somewhere in here.

Q. 150 or 175 feet, that is right, that is correct, isn't it? A. I cannot tell you.

Q. It was your testimony on direct examination that when you were at "A" and the front of the car at "B," you saw the street-car down here 150 to 175 feet away; is that right?

A. I saw the street-car somewhere between this corner—

Q. 150 or 175 feet away?

A. Possibly it might have been 175 feet, about.

Q. Now, the front of your car—you didn't say "about" to-day when you were on direct examination, did you? You said it was 180 feet, didn't you?

A. 150 to 180 feet.

Q. Now, the front of your car was at "B" at that instant, wasn't it? A. When I saw the street-car?

Q. Yes; and it is nine feet from "A" to "B," and "A" was [68] about on a line with this curb, and if it is fifteen feet from the track to the curb, the front of your car was six feet from the track, wasn't it, at the time when you saw the street-car 180 or 150, or 175 feet away; is that right?

A. I think it was about eight feet.

Q. Didn't you say that it was nine feet from "A" to "B"? A. Yes.

(Testimony of M. A. Hunt.)

Q. And that is nine feet, about, on a line with this curb? A. Back of the line.

Q. Very little back of the line. Six or eight feet, we will say. The front of your car is six or eight feet from the track, and the street-car is 175 or 180 feet away? A. That is right.

Q. 150 to 180 feet?

A. I said I would not be sure.

Q. What will you be sure about? Didn't you tell this jury on direct examination that that car was about 180 feet away? A. No.

Q. How far was it away, that is what I want to get at? A. About 150.

Q. Let us see if we can have it clear now. The front of your car is from six to eight feet from the easterly rail, of the nearest track. Your car is in motion going at least eight miles, and the street-car is 150 to 180 feet away; is that right?

A. No, I don't think it was that far away.

Q. You are getting closer now. Didn't you tell me just a minute ago that it was 150 to 180 feet, that it was nearer [69] than 180 and further than 150; isn't that right? Now, at that time, with your car going at least eight miles an hour, and the street-car 150 or 180 feet away, and the front of your car six or eight feet from the track, do you mean to tell the jury, that you, an experienced automobile driver, got frightened at the car and turned to the left with that car that far away; do you tell the jury that is what you did? A. I was not frightened at the car.

Q. Why didn't you drive on across?

(Testimony of M. A. Hunt.)

A. I couldn't get across without the automobile getting square in front. I had slowed my car down. I didn't have power to get it over.

Q. The facts are these, Mr. Hunt, are they not; you first saw the car when the front end of it was about ten feet west of 27th Avenue, and at that instant you were about fifteen feet south of East Cherry Street; you first saw the street-car when the front end of it was not further than ten feet west of this street, and you were about fifteen feet south of East Cherry Street, and that is the situation that existed between you and the street-car when you first observed it? A. That is not correct.

Q. And didn't you then observe that the street-car being so near that you could neither get across or stop or turn to the right, and you attempted to turn to the left and hit the car back about five or six feet back of the front end?

A. No, sir, that is not a fact.

Q. Which is the farthest portion of your car, the fender or [70] the wheels?

A. The wheel was at that time.

Q. Now, when your car is standing straight isn't your fender the farthest point?

A. They are about even.

Q. Were there any marks on that street-car, on the front end of it, or any place, until you got back five or six feet? A. Yes.

Q. Any marks on the car? A. Yes.

Q. Do you think you can see then on a picture?

(Testimony of M. A. Hunt.)

A. I think I could see them on the street-car itself.

Mr. FALKNOR.—I wish to have this photograph marked for identification as “Defendant’s Exhibit “A.”

(Photograph marked as above.)

Mr. HAMMOND.—We will object to interrogating this witness regarding this picture until there is some proof that this picture was taken of that car, and that it was in the same condition when the picture was taken that it was after the accident.

The COURT.—The witness will know.

Mr. FALKNOR.—We will show that it was taken the next day.

Q. You allege it was Car No. 361. That is Car No. 361, isn’t it? (Showing photograph.) A. Yes.

Q. That looks like the car in question? A. Yes.

Q. Do you see any marks on that car in front of the door, where your fender hit it?

A. Right there on this part of your door, right there is the [71] first mark made.

Q. Do you see a mark on that picture. Is there any mark on that picture?

A. You can see the mark across the door now.

Q. I didn’t ask across the door. Is there any mark on the front door? A. Yes.

Q. In that picture?

A. Yes, right there it is. (Indicating with pointer.)

Q. Show it to the jury—oh, you marked on it with that stick a moment ago, you rubbed that stick on it.

(Testimony of M. A. Hunt.)

Your Honor, I am going to ask—he rubbed that stick on there a minute ago—I am going to ask that Car No. 361 be brought here for this jury to see it. He takes a stick and rubs it there and says. “There is a mark.”

Mr. BEVINGTON.—We move to strike the remarks of counsel as prejudicial.

The COURT.—Proceed. The jury will disregard them.

Mr. HAMMOND.—I join with respect to seeing the car.

Mr. FALKNOR.—I can not submit this photograph to the jury because it is not in evidence.

Mr. HAMMOND.—Who took it?

Mr. FALKNOR.—I can not submit this to the jury because it is not admitted in evidence.

The COURT.—Proceed with your examination.

Mr. FALKNOR.—Your Honor, I am advised that Car No. 361 was in a head on collision—Your Honor will remember the Pinkman case, the man from Wisconsin, this car was in a collision in that case, that man who had sued the Wisconsin Central Railway—What I was getting at is that I [72] want to be frank with the jury. This car has been in a collision with another car, and whether or not we can differentiate one scar from the other might be a difficult proposition at this time.

The COURT.—Proceed.

Mr. FALKNOR.—I am perfectly willing for the jury to see the car.

Q. Now, you say you stopped your car?

(Testimony of M. A. Hunt)

A. Yes.

Q. What did you stop it for; why didn't you keep on turning it around?

A. I put on the emergency brake and it stopped. That is what I was trying to do, stop, and I got on the brake.

Q. You were turning to the left?

A. I turned in to the left before I put on my emergency brake to stop, and I couldn't allow my car to go any further towards the track without turning. If I did I would have been on the track.

Q. How far was the street-car away when you stopped your automobile?

A. It was very close to me when I got it stopped.

Q. Why didn't you get your car in motion? What did you stop it for? Your car was going around to the left, why didn't you keep on moving it, what did you stop it for?

A. I stopped it supposedly that it was outside of the car track.

Q. Then you did stop it purposely, didn't you.

A. I stopped it purposely.

Q. You could have sent it on further, couldn't you?

A. No, I didn't think I could, under the circumstances. After [73] I put on the emergency brake I had no power left.

Q. But you didn't need to stop right at the place you did, did you?

A. Well, I don't understand that question.

(Testimony of M. A. Hunt.)

Q. You didn't need to stop the car right where you did stop it, did you?

A. I didn't need to stop the car at all.

Q. That is the point, you didn't need to stop the car at all.

A. I could go on and let them hit me in the side.

Q. Your car was going to the left, you didn't need to stop at all. It only hit your right wheel. You could have kept your car right on to the left, couldn't you?

A. No, I couldn't keep my car going; if I had I would have—

Q. Before you stopped it, I am talking about. You stopped there purposely, because you thought you were far enough away. Why didn't you keep your car going?

A. The emergency brake stopped it.

Q. You put the emergency brake on, and stopped it. You could have kept your emergency brake off and run it?

A. I could not go any further. I would have ran into the telegraph pole if I ran the other way.

Q. You stopped the car because you thought you were far enough away to allow the car to go by, didn't you? A. That was not the reason I stopped.

Q. Well, you stopped your car at a place where you thought you were far enough away to let the car go by, is that it?

A. I was not certain whether I was or not.

Q. Didn't you tell this jury two or three times that when you stopped your car you thought you were far

(Testimony of M. A. Hunt.)

enough away? [74] A. I did think so.

Q. And you told this jury that you didn't have to stop it there, you could have kept going right on, isn't that right?

A. I had to stop there if I put on my emergency brake.

Q. You didn't have to put on your emergency brake, did you, you could have put on your foot brake?

A. I had on my foot brake, and it didn't stop the car solid enough.

Q. Let us get this clear. As a matter of fact, your car never stopped at all until it ran into the street-car, did it?

A. Yes, it did. It stopped dead still, and I was trying my best to work it into the reverse when they hit me.

Q. Why were you working it into the reverse when they hit you, if you thought that you were far enough away to let the street-car go by?

A. I was not sure of my position.

Q. You didn't need to stop it where you did stop it, did you?

A. I stopped it the best I could stop it.

Q. Now, your car was in motion, and everything was all right. Why didn't you, when you came here, why didn't you swing your car off to the left, after you saw the street-car, why did you run out there and stop it?

A. I couldn't swing it in a shorter place than that.

Q. It was going slow?

(Testimony of M. A. Hunt.)

A. You couldn't turn in as short a place as that.

Q. Fifteen feet, and you could not turn your car in there, and stop close to the curb?

A. After I saw it, I had no fifteen feet to turn.

Q. The car was down here 180 feet when you saw car, wasn't it? [75]. Do you tell the jury that you didn't have time to whirl your car to the left and avoid a collision if the stree-car was that far away?

A. I only had time to do what I did.

Q. Just stop it where the street-car would come, is that the idea? Did you or did you not have to stop it there, that is what I want to get at?

A. Under the circumstances, I had to stop it there.

Q. You had to stop it there? A. Yes.

Q. Why did you have to stop it there?

A. Because I had put on my emergency brake and had no power.

Q. You didn't have to put on your emergency brake? A. Yes, I did; I wanted to stop.

Q. Why didn't you, instead of stopping, keep on going to the left?

A. I just told you I couldn't go up there to the left on the same angle or my wheels would run onto the telegraph pole.

Q. The telephone-pole away over here about fifteen feet from you; you tell the jury you would run into the telephone-pole?

A. That is not where the telephone-pole is.

Q. That is where it is on your engineer's map.

A. The next one, I am talking about. You would

(Testimony of M. A. Hunt.)

run into that telephone-pole if you kept the same angle.

Q. Which telephone-pole?

A. Probably run into the sidewalk.

Q. Show us which telephone-pole you would run into if you had to run out there and stop? [76]

A. The telephone-pole or sidewalk?

Q. What telephone-pole are you talking about that you would run into?

A. The sidewalk there, and the team was in there.

Q. The team was away down here, wasn't it?

A. Yes.

Q. You didn't have to run out there and stop, because of this team, did you?

A. Well, I couldn't run between the car and the team.

Q. There was plenty of room between the team and 27th Avenue without running into the team.

A. Yes, but I didn't have much time to consider how much room I had there.

Q. You were an experienced driver? A. Yes.

Q. So you ran it out there and stopped where the street-car would hit it?

A. I turned my wheels as far to the left as I could, but I couldn't make the turn after I saw the car.

Q. When you first saw that street-car, it was then ten or fifteen—the front end of it was ten or fifteen feet from 27th Avenue, and you were down here about fifteen feet from East Cherry Street, going 25 miles an hour; you were going so fast you couldn't make the turn, and you skidded into the front end

(Testimony of M. A. Hunt.)

of the car, isn't that all there is to it?

A. No, that is not a fact.

Q. Why didn't you turn to the right, as the ordinance requires you to, turn to the right here, when you were here, why didn't you turn down that way? [77]

I would have went on the track the same as the other way.

Q. Didn't you know the ordinance of the city required you to turn to the right?

A. Not when you are going to the left.

Q. When you go to the left, it requires you to go around the intersection of the street?

A. Yes, sir; past the center.

Q. Not to turn to the left?

A. I have that right in the case of an accident.

Q. Does the ordinance give you that right in case of an accident?

A. Yes, sir. They give me any right in the world to avoid an accident.

Q. The ordinance says you should turn to the right, and if you turn to the left go around the intersection. Couldn't you turn to the right when you saw the car 180 feet away? A. I could not.

Q. And your car only going eight miles an hour?

A. I hadn't space enough without turning into the track.

Q. There is fifteen feet from this curb to the rail, and you tell the jury you could not swing the car to the right in fifteen feet?

A. The end of my car was in the street.

(Testimony of M. A. Hunt.)

Q. Couldn't the end of your car be swung around here, and—

A. (Interrupting.)—Not a Hudson automobile cannot, not a six cylinder cannot be.

Q. You examined into this machine carefully?

A. Yes.

Q. And you thought they were about the best going? A. They are a good machine. [78]

Q. Do you mean to tell the jury you couldn't take that six-cylinder Hudson, going eight miles an hour, and swing it right off sharp against that curb?

A. No. Not when the front of your car is nine or ten feet from the curb.

Q. You mean going 25 miles an hour?

A. Or five miles an hour, or a mile an hour, you couldn't do it.

Q. Now, you paid \$400 on this machine, didn't you? A. Yes.

Q. You had it how many days?

A. I cannot tell you, exactly.

Q. About 38 or 40 days?

A. I cannot tell you, exactly.

Q. Give me some idea. You know.

A. Possibly six weeks.

Q. That is about 40 days, isn't it? You say the net rental of that car per day was ten dollars. That is what it was worth outside of the labor or material, or gas used on the car, ten dollars per day.

A. Yes.

Q. So then you got \$400 of rent out of that car, didn't you?

(Testimony of M. A. Hunt.)

A. Well, I don't know that it would be worth that much.

Q. It is not worth that much to you, is that the idea? You swore in your complaint it was worth ten dollars a day as rental. A. Yes.

Q. And you only paid \$400? A. Yes.

Q. You only paid for the rental of the car for the time you [79] had it, didn't you?

A. Just about.

Q. Just about; did you pay for these repairs?

Mr. BEVINGTON.—I object to that as immaterial.

Mr. FALKNOR.—It leads up to the point that he is not obligated.

The COURT.—He may answer.

A. They are charged to me. I haven't paid them.

Q. They are charged to you since you surrendered the car? A. I don't know about that.

Q. You know that they don't hold you for them?

A. No, I don't know it.

Q. You don't intend to pay it?

A. I certainly intend to pay them.

Q. You haven't paid them? A. No.

Q. More than a year has gone by?

A. I haven't had money to pay it. That is why.

Q. That is the only reason you haven't paid it?

A. The manager of the car company never heard me say, nor I never said I didn't—

Q. (Interrupting.) When did they last ask you for the payment of these repairs?

A. I don't know.

(Testimony of M. A. Hunt.)

Q. So long ago you don't remember?

A. I don't know if they ever asked me.

Q. You know they never asked you for the payment of those repairs. Did you ever have this car after this accident in your possession, to use it?

A. No.

Q. They took it back, didn't they? The Pacific Car Company [80] was the company from whom you purchased the car, wasn't it? A. Yes.

Q. They took the car into their garage after this accident?

A. I telephoned to them to come and get the car.

Q. You went with the car to their garage, and left it in their garage, didn't you? A. Yes.

Q. The people who sold you this car had the repairs put on it, didn't they? A. Yes, by my order.

Q. And then they sold the car to somebody else because you didn't make your payments?

A. They sold the car after they took the car back.

Q. You never had it after the 23d day of September, did you?

A. No, I didn't have possession of the car.

Q. Yes, they took it back on the day of the accident, didn't they? A. No, they did not.

Q. Well, you never had it after that?

A. No, I didn't have it.

Q. Who did have it after that?

A. Why, it was getting repaired.

Q. Who was making the repairs, the Pacific Car Company? A. The Pacific Car Company.

Q. So they had possession of it from the time of the

(Testimony of M. A. Hunt.)

accident, all the time afterwards?

Mr. HAMMOND.—If the Court please, the contract itself, which has been admitted in evidence, shows that they could not take it back until the next payment was due, which was a month or more afterwards. [81]

Mr. FALKNOR.—They did take it back.

The COURT.—Proceed.

Q. They took it back on the day of the accident, and you never had it afterwards?

A. They took it back on the 5th day of February; they took it back subject to the contract.

Q. They surrendered this note to you on this date, that is the date they gave you back the note?

A. Yes, and a statement with it.

Q. You called the thing off. They handed back your contract and your note, and that was the final wiping out of the account between you?

A. No, I didn't hand back anything.

Q. They handed you back the note? A. Yes.

Q. And you took it? A. Yes.

Q. And since that time nobody has ever asked you for one cent on these repairs?

A. I don't think I have seen any of them.

Q. So, as a matter of fact, you have not been out—you are not out a thing on the car. If it is worth ten dollars a day rental you only paid about the fair rental of the car while you had it? That is true?

A. My time in there was worth something.

Q. You are carrying on your trade now?

A. I am working a little.

(Testimony of M. A. Hunt.)

Q. You are working as an extra-man?

A. I am not hardly working as an extra-man.

Q. In these shops they have what they call extra-men, haven't they? [82]

A. I am only working—

Q. (Interrupting.) Answer my question. In these shops they have what they call extra-men, haven't they? A. Yes, they do have extra-men.

Q. And you are working as an extra-man?

A. No.

Q. That is what you have been generally doing since this accident, working in different shops as an extra-man? A. I am hardly working extra now.

Q. They don't work full time?

A. They have to work six hours. I don't work that long.

Q. They don't work the full ten hours? A. No.

Q. As a matter of fact—let us be fair—in these shops where you have been working you have been going around as an extra-man, and you haven't worked full time because extra-men don't work full time? A. Extra-men don't work full time.

Q. Haven't you been working in the capacity of an extra-man?

A. I did work as an extra-man, but not now.

Q. Where are you working now?

A. On Pike Street.

Q. Whose shop?

A. A man by the name of Sadler.

Q. Then you are working as an extra-man?

A. No, because an extra-man gets guaranteed a dollar and a half a day. I don't.

(Testimony of M. A. Hunt.)

Q. You are working now as a helper, helping out?

A. Yes. [83]

Q. You are not expected to work full time?

A. No.

Q. Are there any scars on you anywhere as the result of this accident? A. No.

Q. Were there ever any scars? A. No.

Q. There never were any scars where the skin was broken? A. A little bit of a place.

Q. Where was that little bit of a place?

A. On the elbow.

Q. Now, after the accident you got out of the car, and you told the people there you were not hurt?

A. I didn't think I was hurt much.

Q. You helped to bring the car in?

A. Yes, I did.

Q. You went to the Pacific Car Company with your car? A. I went up there.

Q. You told them you were not hurt?

A. I told them I didn't think I was hurt much.

Q. Don't you think if you had been hurt much that by that time you would have begun to feel it?

A. I felt jammed up.

Q. Wasn't there any place where the skin was broken except the elbow? A. That is all.

Q. You were perfectly conscious out there?

A. Yes.

Q. Your breath was not knocked out so you could not tell people?

A. No, but I couldn't catch it for a little bit afterwards. [84]

(Testimony of M. A. Hunt.)

Q. Did you have a talk with Mr. Rupli, either that day or the next day, the assistant claim agent, in regard to this car, where he asked you if anyone in the car was injured, and you said, "No, fortunately neither of us was hurt"? A. With who?

Q. With Mr. Rupli; did you have a talk with Mr. Rupli that day?

Q. What day are you talking about?

Q. The day of the accident, either that day or the next day, my recollection is not clear.

A. A personal talk.

Q. Mr. Rupli, the assistant claim agent, talked to you over the telephone, wherein he asked about whether anybody in the automobile was hurt, and you said, "Fortunately, neither of use were hurt."

Mr. HAMMOND.—You say a conversation over the telephone.

Mr. FALKNOR.—Yes, with Mr. Rupli, assistant claim agent.

Mr. HAMMOND.—How did he know.

Q. Did you have a talk with anybody in the Claim Department with reference to the damages on this car? A. I don't think so.

Q. Did you have any talk with anyone over the 'phone?

A. I don't think I talked with anyone over the 'phone, unless it was Mr. Atkinson, for him to come and get the car. I think Mr. Bevington called up the Seattle Electric Company. I don't remember now.

Q. Didn't you both, you and Mr. Bevington that day, talk to the Claim Department over the 'phone,

(Testimony of M. A. Hunt.)

and both of you state "Fortunately, neither of us were hurt"? [85]

A. I don't think I talked to him.

Q. Well, you didn't go to bed that night until about eight or nine o'clock, the customary time, did you?

A. I didn't go to bed until I got home.

Q. You were up until nine o'clock, were you not?

A. No, I laid down all the time I was there, over to the lady's where my wife was. I was laying down at the time after I got there.

Q. What time did you get there

A. I think it was half past two, or three o'clock.

Q. This accident occurred in the morning?

A. Eleven o'clock, about.

Q. You say you didn't hear any bell on the street-car? A. No, sir, I did not.

Q. At no time? A. At no time?

Q. Yes.

A. I didn't understand that question.

Q. At no time after you got out where you saw the street-car, or immediately before, did you hear any bell on the street-car?

A. Yes, sir; at about the time it hit me I heard the bell.

Q. Oh, you did. A. They rang it just then.

Q. Don't you know that that bell had been ringing quite a distance back as it came by the apartment house, one of those rotary gongs that you could easily hear? A. I didn't hear it until they hit me.

Q. You knew that street-cars operated up and down those streets? [86]

(Testimony of M. A. Hunt.)

A. Yes.

Q. If you couldn't see a street-car behind this one little wagon, why didn't you take a precaution to see that there was a street-car coming before you drove out and stopped?

A. I saw the street-car before I drove out there and stopped.

Q. You saw it before you drove out there and stopped? A. Yes.

Q. And yet you tell the jury you drove out and stopped and thought you were far enough away to let the street-car go by?

A. As far away as I could get. I couldn't turn my car any further.

Q. You got pretty much excited, put on your brake and stopped the car?

A. No, I was not excited. I was more excited after it was over than I was at the time. I was not excited then.

Mr. FALKNOR.—That is all.

(Whereupon the Court takes a short recess.)

Mr. FALKNOR.—I want to ask Mr. Hunt another question.

Q. You had your wind-shield up at the time?

A. Yes, sir, and the top too.

Q. The wind-shield was not broken?

A. No, sir.

Q. The wind-shield was between you and the street-car? A. Yes.

Q. No part of the street-car hit you? A. No.

Mr. FALKNOR.—That is all. [87]

(Testimony of M. A. Hunt.)

Redirect Examination.

Q. (By Mr. Hammond.) I will ask you to state whether or not after you would get the first glimpse, or you would first see the street-car, whether or not it would take any time, the car would be rolling, and it would take any time before you could put on your brakes?

Mr. FALKNOR.—I object to that as a matter of argument?

The COURT.—He may answer.

(Exception noted for defendant.)

A. It would take some time, yes, sir.

Q. After you saw the car, before you put the brakes on, state whether or not the car was continually rolling? A. It was.

Q. And you say it was at "A" when you first saw the car, and by the time you could get your brakes on, get it stopped, it had rolled down to "C"?

Mr. FALKNOR.—I object as suggestive and leading.

The COURT.—He may answer.

(Exception noted for defendant.)

Q. Is that what I understood?

A. When I was at "A" I saw the car. By the time I could get my brakes on and get stopped it stopped at "C."

Q. This happened at eleven o'clock in the morning, and it was a bright, sunshiny day?

A. Twenty minutes to eleven?

Q. The streets were dry? A. Yes, sir.

Q. Counsel asked you why you did not turn to the

(Testimony of M. A. Hunt.)

left more, or turn to the right. State whether or not you did turn [88] your steering gear to the left as soon as you saw the car? A. I did.

Q. State in which direction your car was headed when you first saw the street car? Was your automobile headed straight across, or were you making a turn this way, (indicating) or any turn that way?

A. A trifle to the left, I was making a turn.

Q. You were going down this way to go across here? (Indicating.) A. Yes.

Q. So that when you first saw the street-car your automobile was practically straight ahead?

A. Yes.

Q. And you turned it to the left and started to stop it?

A. I thought I could make the turn in there without meeting the car.

Q. Turn in here? (Indicating.)

A. The reason I stopped was simply because I would hit the street-car at the same time the street-car hit me if I didn't stop. I could not get in there.

Q. About how many feet is it from "D" to this track here, do you remember?

A. About eight feet, I should judge.

Q. And your wheels were a little to the left.

A. Turned a trifle to the left, and I threw them clear over as far as I could.

Q. If you had thrown it again to the right where would it have taken you?

A. Right out across the tracks.

Q. State whether or not as you came down here

(Testimony of M. A. Hunt.)

you ever had [89] any intention of turning in here at all? A. I did not.

Q. Nor in here? (Indicating.)

A. I did not, either place.

Q. And you made no attempt to turn until you saw the car? A. No, sir, I did not.

Mr. FALKNOR.—Don't lead the witness. You are leading all the time. I object to your leading.

Mr. HAMMOND.—That is all

Re-cross Examination.

Q. (By Mr. Falknor.) You had your brakes on already when you saw the street-car?

A. I had the foot brake on.

Q. Yes, you had your foot on your foot brake, and was pressing down on it?

A. Yes, sir, I was. I had it under control all the time.

Q. And as I understand it your car was practically straight ahead at the time you saw the street-car?

A. Practically; turned a little bit to the left.

Q. You didn't have any right to turn to the left until you got across to the other side of the street?

A. Yes, in the center of the street I had the right.

Q. Isn't it true that your car was practically straight? A. Practically straight.

Q. You could have turned to the right as well as to the left?

A. Yes, I could have turned to the right.

Q. Instead of turning to the right you turned to the left, right into the car? [90]

A. I didn't turn into the car.

(Testimony of M. A. Hunt.)

Q. If you had turned to the right you could have speeded up and run ahead?

A. No, I didn't have time.

Q. Well, your car would catch speed instantly when you put your foot on the gas. You had your foot on the gas valve at the time, and all you had to do was turn to the right, put your foot on the gas and speed? A. Yes.

Q. You could have beat the car to the next block if you wanted to? A. No.

Q. What speed could you run that car?

A. What speed could I run that car?

Q. Yes.

A. Oh, I could run the car up, I suppose,—I never tried how fast I could run—probably about sixty miles.

Q. All you had to do was to press down on the gas valve? A. Yes, but it takes some time.

Q. When you are going at least eight miles an hour she picks up the rest awful quick. If you had turned that car to the right, and had not lost your head, you could have run ahead of that street-car, couldn't you? A. No, I couldn't get across.

Q. You could have turned to the right?

A. I couldn't turn without running on the track. I was only eight feet from the track.

Mr. FALKNOR.—That is all.

(Witness excused.) [91]

[Testimony of C. L. Malvurn, for Plaintiffs.]

C. L. MALVURN.—Produced as a witness on behalf of plaintiffs, being first duly sworn, testifies as follows:

Q. (By Mr. HAMMOND.) State your name?

A. C. L. Malvurn

Q. What is your business? A. Contractor.

Q. Where is your place of business?

A. 525 21st Avenue.

Q. That is on the corner of 21st Avenue and East Jefferson Street? A. 21st and East James.

Q. That is about seven or eight blocks from 27th Avenue and Cherry Street? A. Yes.

Q. Do you remember being on Cherry Street, about 27th Avenue, on the 23d day of September, 1913? A. Yes, sir.

Q. Do you remember an accident occurring there, a street-car running into an automobile or otherwise? A. Yes, sir.

Q. Did you see Mr. Hunt there at that time?

A. I did.

Q. Did you see the accident? A. I did.

Q. I wish you would state to the jury as near as you can remember the circumstances connected with that accident, and if you need to indicate anything here if you will just step forward and take this pointer and indicate it.

A. I was driving down Cherry Street, going west, and the [92] first thing I saw of Mr. Hunt he was coming down here, (indicating) and the street-car was coming down East Cherry.

(Testimony of C. L. Malvurn.)

Mr. FALKNOR.—I object to the question as suggestive and leading.

The COURT.—He may answer.

(Exception noted for defendant.)

(Question repeated to witness.)

A. I didn't see Mr. Hunt bring his car to a stop.

Q. You don't know whether Mr. Hunt's car was stopped or not?

A. No. The only thing I can say is that I thought that there had not been any accident, because the car was between Mr. Hunt and me.

Q. Was there any period of time between the time when you saw Mr. Hunt at about the point "C" here before the street-car got down between you and the automobile? A. No, none whatever.

Q. Almost— A. Instantaneous.

Q. Almost instantaneously they got there?

A. They both got to that point at the same time.

Q. Practically the same time?

A. Practically the same time.

Q. Is this a thickly settled part of the town?

A. No. There is an apartment house, and there are no houses along here at all. (Indicating.) There is a school down here, and on 27th Avenue there are two or three houses, and there are no other houses until—

Q. There are a lot of houses down here? (Indicating.) [95]

A. Yes, on 27th Avenue, but there are no houses here and here. (Indicating.)

Q. No houses back of the apartment house, and no

(Testimony of C. L. Malvurn.)

houses along this street? (Indicating.) A. No.

Q. But here and here and here, and here is a school over here?

A. The school is down this way, about 25th or 24th.

Q. Now, let me ask you whether or not after this accident happened you stopped your automobile?

A. Yes, I stopped my automobile, oh, probably, I should judge, at about directly across from the entrance to the apartment-house.

Q. Did you at that time notice whether or not there was a team of horses with a covered wagon along here anywhere? A. There was.

Q. About where was that team of horses standing?

A. It was standing between the entrance to the apartment-house and the alley.

Q. That is, between the middle of the apartment-house and the west end of it? A. Yes.

Q. Somewhere in there? (Indicating.)

A. Yes.

Q. Was it a low wagon or a high, covered wagon?

A. It was a covered wagon.

Q. About where, Mr. Malvurn, did the street-cars stop after the accident?

A. Well, the street-car stopped the other side of—let's see, I would have to look at the map.

Q. Come down here again and indicate. [96]

A. The street-car stopped—there is a telephone pole and a hydrant, and the rear end of the car was about here. (Indicating.)

Q. And the head end was—

A. About here. (Indicating.)

(Testimony of C. L. Malvurn.)

Q. When you say the rear end of the car stood here you mean at the point "E" as indicated on Plaintiff's Exhibit No. 1? A. Yes.

Q. And the front end at the point "F"?

A. And the front end at the point "F."

Q. State whether or not you saw anyone, the conductor or the motorman on that car, come back and pick up any part of the street-car.

A. The cover of the box was picked up in here. (Indicating.)

Q. In here means a little north of 27th Avenue?

A. It is about even with 27th Avenue on the north side.

Q. And on the south side of Cherry Street?

A. Yes.

Q. Do you know what boxing that was, whether it was the rear axle or the front axle, or what it was?

A. I am sure it was the boxing off the rear axle. It was off the rear end of the car.

Q. Did you see anything else near the intersection of 27th Avenue and East Cherry Street at this time?

A. There was a gentleman, I don't know who he was.

Q. Where was he?

A. He was in here some place. (Indicating.) I remember seeing some party.

Q. You don't know who he was?

A. I didn't know him, and wouldn't know him again if I saw him. [97] I took this all in at a glance. I remember seeing somebody.

Mr. HAMMOND.—That is all.

(Testimony of C. L. Malvern.)

Cross-examination.

Q. (By Mr. FALKNOR.) You were going west on East Cherry? A. Yes.

Q. Was anybody with you? A. No.

Q. How far up East Cherry Street were you when you first observed the plaintiff?

A. Well, I practically saw Mr. Hunt and the car at the same time.

Q. How far?

A. I was probably in here. (Indicating.)

Q. Will you mark an "X" there? (Witness does so.) About what speed were you going?

A. I was probably going about ten miles an hour.

Q. You got down, and at the time of the accident you were about opposite.

A. I was about—I was probably in here at the time of the accident.

Q. You make a "V" where you were. (Witness does so.) That is, you drove from "X" to "V" from the time you observed them to the time of the accident? A. Yes.

Q. Now, as compared with your speed was he going slower or faster?

A. When I saw him first he was going about twenty miles an hour. [98]

Q. Going about twice as fast as you were?

A. Going about twice as fast as I was.

Q. Anyway he was some little distance down on 27th Avenue?

A. He was on the other side—probably twenty feet back of this apartment house.

(Testimony of C. L. Malvern.)

Q. When you first observed him?

A. In that neighborhood. I could not say.

Q. About how wide is that apartment house?

A. The apartment house is about 60 feet wide.

Q. And he was about 80 feet on 27th Avenue when you first saw him? A. Yes.

Q. And you observed him about the same time you saw the street-car? The street-car was at what place when you observed it?

A. It was in here some place. (Indicating.)

Q. About "B"? A. About "B."

Q. He had 80 feet to come on 27th Avenue while the street-car came on Cherry Street, and they both arrived there at the same time? A. Yes.

Q. And about the time he was at "A" the street-car would be about in there? (Indicating.)

A. About the time—as I judge, Mr. Hunt really saw the street-car when he was about in here, (indicating) and the car, as you say, was in here.

Q. There could have been nothing to prevent him seeing the street-car when he got by the apartment?

A. Not when he got by, except the team here.

[99]

Q. Well, when he got by the car was already by the team? A. I could not say that.

Q. You would think so, wouldn't you?

A. Repeat the question.

Q. When he got so he could see the street-car on Cherry Street the street-car was already by the team? A. No, I don't think it was.

Q. They both approached this intersection at

(Testimony of C. L. Malvurn.)

about the same time?

A. I know, but the car was going twice as fast.

Q. I didn't ask you that. But they were approaching the same point at the same time?

A. Yes.

Q. And he could see the street-car about the time that he got by the apartment house?

A. Yes, he could see the car there about the time he got where he could see beyond the apartment.

Q. The moment the seat in the automobile got by the apartment house he should have seen the street-car? A. He should have seen the street-car.

Q. He never stopped his car that you noticed?

A. No, I didn't see him stop the car.

Q. You were over at "V"? A. Yes.

Q. And at no time did you see him stop?

A. Not to a dead standstill.

Q. He was still moving?

A. He was still moving the last I saw him.

Q. Now, Mr. Malvurn, you didn't get off and look particularly at the rear of the car and notice just exactly where it [100] stopped?

A. Yes, I did. I got off and went back to where the conductor and all of them were.

Q. I know, but they all kept back, you went to the accident? A. No, the car was up here.

Q. As a matter of fact, Mr. Malvurn, didn't the rear of that car stop about even with the east side of 27th Avenue?

A. No, sir, the car stopped right up here, sir. (Indicating.)

(Testimony of C. L. Malvurn.)

Q. If people working on the street and seeing the accident, and who observed it particularly, you would not insist you were right?

A. I certainly would.

Q. That the car went way up here?

A. That the car went up to this point here.

Q. Way up there? A. Yes.

Q. Do you know Mr. Jones of the Pacific Motor Company? A. No.

Q. Did you ever speak to him about the accident?

A. No.

Q. Now, you were not paying any attention to this street-car until you first observed it along about "D," were you?

A. I noticed the car was coming mighty fast.

Q. Now, do you mean to tell the jury that that car didn't stop on the far side of 26th Avenue for passengers to get off and on?

A. Yes, I mean to say they didn't stop.

Q. Yet you hadn't any particular reason to be observing the car?

A. The only reason I know they didn't stop was because if [101] they had stopped they could not have the speed.

Q. Then you are reasoning. If they did stop here then you are wrong on your speed; then they could not have gotten up any thirty miles?

A. They were going thirty miles.

Q. You insist they were going thirty miles an hour, therefore you tell the jury they did not stop at the other street. That is all.

(Testimony of C. L. Malvern.)

Mr. HAMMOND.—Go ahead.

The WITNESS.—I saw the car before it came to 26th Avenue. I saw the car west of 26th Avenue.

Redirect Examination.

Q. (By Mr. HAMMOND.) Did you see it go on by? A. I saw it coming beyond 26th Avenue.

Q. You saw it coming beyond 26th Avenue?

A. I saw the car west of 26th Avenue.

Q. How do you know it didn't stop?

A. Because it didn't. I didn't see it stop.

Q. If it had stopped you would have seen it?

A. I would have seen it. I drive that road every day, and the car was coming a whole lot faster than they usually come up Cherry.

Q. When you stated to counsel that if Mr. Hunt had come out here from 27th to Cherry he could have seen the car, that is merely a matter of opinion of your's, you don't know what he could see?

A. No, I don't know what Mr. Hunt could have seen or what he did see. [102]

Q. You don't know whether that wagon obstructed his view or not, do you?

Mr. FALKNOR.—I object to that as suggestive and leading.

The COURT.—Objection sustained. The jury has the testimony of the witness.

Q. Did you observe whether or not that car skidded? A. The automobile skidded?

Q. Yes. A. No, it did not.

Q. It did not skid? A. It did not skid.

Q. What did it do after the brakes took hold; did

(Testimony of C. L. Malvurn.)

you go back and look at it, or did you examine it or do anything? A. At the time?

Q. Yes.

A. Just as soon as everything happened I knew how far back he set his brakes because there were tire marks. I noticed that.

Q. The tire marks are not skid marks?

A. They were not until practically three or four feet before—that is, back of where the rear end of the car stood. They were not skid marks, they were just places where the tire would take hold on the pavement and pull off live rubber.

Q. By skidding you mean the whole car pushing around, the brakes set and the car pushing of its own weight? A. Yes.

Q. There were no such marks at this place, the car did not skid? A. The car did not skid, no, sir.

[103]

Recross-examination.

Q. (By Mr. FALKNOR.) Did the wheels slide?

A. Why, they might have slid six inches.

Q. When the emergency brake and the foot brake were on were not both wheels in the rear locked?

A. Yes.

Q. Then they were not going around? A. No.

Q. Then they were sliding on the pavement?

A. They were.

Q. How far did they slide?

A. Probably six or eight inches.

Q. Didn't they slide fifteen feet?

A. No, sir, they did not.

(Testimony of C. L. Malvern.)

Q. (By Mr. HAMMOND.) Was there any time prior to just before the street-car arrived at where the automobile was that the emergency brakes were on at all?

A. Well, I couldn't really say that. As I say, I didn't see the accident proper and when the emergency brakes were applied. The way I have it figured out the street-car was between me and Mr. Hunt.

Q. You are sure then, as I understand you to say, that when Mr. Hunt came into Cherry Street he was not exceeding eight miles an hour?

A. Very little, if any.

Q. (By Mr. FALKNOR.) And he didn't put on the emergency brake until he got by the car?

A. Until he got by which car?

Q. The street-car—I mean by your vision, that is what you [104] tell the jury?

A. I don't know anything about when Mr. Hunt put the emergency on.

Q. Didn't you say a while ago that he didn't put the emergency on until the street-car got between you and him? A. I say I didn't see him.

Q. You don't know if he had it on?

A. I don't know anything about it. The only thing—all I know is the tire marks were on the pavement.

Q. Showing that the wheels slid?

A. The wheels slid about six or eight inches. Those were the last deep marks on the pavement.

Q. (By Mr. HAMMOND.) Do you remember

(Testimony of C. L. Malvurn.)

whether or not these wheel marks were on a curve, whether the car was on a curve, or whether it was straight ahead? A. The car was on a curve.

Q. And you saw these marks after the marks were made? A. At these marks and back a ways.

Q. (By Mr. FALKNOR.) Did this street-car stop at 25th Avenue? A. I could not say.

Q. You could see it coming, couldn't you?

A. I could.

Q. Did it stop at 24th Avenue?

A. Yes, it stopped there I know, because they have to.

Q. You know they have to stop at 24th Avenue, but did you see it stop there? A. I didn't see it.

Q. You were looking that way?

A. I would naturally look ahead.

Q. And yet you can't tell whether it stopped at the school [105] sign or not? A. No.

Q. And yet you were looking down that way?

A. Certainly.

Mr. FALKNOR.—That is all.

Mr. HAMMOND.—That is all.

(Witness excused.) [106]

[Testimony of Allen Smith, for Plaintiffs.]

ALLEN SMITH, produced as a witness on behalf of plaintiffs, being first duly sworn, testifies as follows:

Q. (By Mr. HAMMOND.) State your name.

A. Allen Smith.

Q. What is your business?

A. Well, sir, I follow the soliciting of newspapers.

(Testimony of Allen Smith.)

Q. Were you a solicitor for the newspaper on the 23d of last September? A. Yes, sir.

Q. What paper? A. The "P-I."

Q. At about eleven o'clock on that day were you near the intersection of 27th and Cherry?

A. Yes, sir.

Q. About eleven o'clock in the morning?

A. I was.

Q. Did you see the accident that occurred there when the automobile ran into the street-car, or the street-car ran into the automobile? A. I did.

Q. Where were you standing—if you will come down here and indicate, Mr. Smith.

A. Right there. (Indicating on Exhibit "A.")

Q. You were standing on the north—

Mr. FALKNOR.—Make some mark, mark an "S" there.

Q. You were standing on the northwest corner of 27th and Cherry, on the north side of the street?

A. Yes.

Q. Did you see Mr. Hunt come down 27th in his automobile? [107] A. I did.

Q. Did you see a street-car coming west, or going east on Cherry Street? A. I did.

Q. Where was Mr. Hunt and the automobile when you first observed them?

A. Well, just about betwixt and between, about halfway of the block. Here is the block there, right about there.

Q. About half way?

A. About half way between half of the block and

(Testimony of C. L. Malvern.)

whether or not these wheel marks were on a curve, whether the car was on a curve, or whether it was straight ahead? A. The car was on a curve.

Q. And you saw these marks after the marks were made? A. At these marks and back a ways.

Q. (By Mr. FALKNOR.) Did this street-car stop at 25th Avenue? A. I could not say.

Q. You could see it coming, couldn't you?

A. I could.

Q. Did it stop at 24th Avenue?

A. Yes, it stopped there I know, because they have to.

Q. You know they have to stop at 24th Avenue, but did you see it stop there? A. I didn't see it.

Q. You were looking that way?

A. I would naturally look ahead.

Q. And yet you can't tell whether it stopped at the school [105] sign or not? A. No.

Q. And yet you were looking down that way?

A. Certainly.

Mr. FALKNOR.—That is all.

Mr. HAMMOND.—That is all.

(Witness excused.) [106]

[Testimony of Allen Smith, for Plaintiffs.]

ALLEN SMITH, produced as a witness on behalf of plaintiffs, being first duly sworn, testifies as follows:

Q. (By Mr. HAMMOND.) State your name.

A. Allen Smith.

Q. What is your business?

A. Well, sir, I follow the soliciting of newspapers.

(Testimony of Allen Smith.)

Q. Were you a solicitor for the newspaper on the 23d of last September? A. Yes, sir.

Q. What paper? A. The "P-I."

Q. At about eleven o'clock on that day were you near the intersection of 27th and Cherry?

A. Yes, sir.

Q. About eleven o'clock in the morning?

A. I was.

Q. Did you see the accident that occurred there when the automobile ran into the street-car, or the street-car ran into the automobile? A. I did.

Q. Where were you standing—if you will come down here and indicate, Mr. Smith.

A. Right there. (Indicating on Exhibit "A.")

Q. You were standing on the north—

Mr. FALKNOR.—Make some mark, mark an "S" there.

Q. You were standing on the northwest corner of 27th and Cherry, on the north side of the street?

A. Yes.

Q. Did you see Mr. Hunt come down 27th in his automobile? [107] A. I did.

Q. Did you see a street-car coming west, or going east on Cherry Street? A. I did.

Q. Where was Mr. Hunt and the automobile when you first observed them?

A. Well, just about betwixt and between, about halfway of the block. Here is the block there, right about there.

Q. About half way?

A. About half way between half of the block and

(Testimony of Allen Smith.)

the end of the block when I saw him.

Q. About two-thirds of the block south of Cherry Street? A. Just about, yes.

Q. Did you observe the rate of speed that he was going at, whether he was going fast or slow there?

A. I did. I judge he was going about between fifteen and twenty miles an hour.

Q. Did you observe him after that; did the car slow down, or go faster, or what took place after that, so far as the action of the automobile is concerned?

A. As he got along down in here he checked his car, and was running very slow; I suppose about the average would be about something like eight miles an hour, to the best of my ability.

Q. Now, what experience have you had in driving automobiles or noticing the speed of anything that would cause you to put that estimate on the speed?

A. I have a friend that used to own one, and I was in it all the time, very near.

Q. When was that? [108]

A. About three years ago.

Q. Were you in the car very often, about how often?

A. All the way from three to four times a week, and then sometimes more.

Q. For what length of time?

A. Well, for nearly a year.

Q. You think that the automobile was going into Cherry Street about eight miles an hour?

A. After it reached within about thirty feet of Cherry Street.

(Testimony of Allen Smith.)

Q. Now, where was the street-car when you first observed it?

A. The street-car, when I first observed it, was about the center of 26th Avenue on Cherry Street, going east.

Q. Did the street-car stop at 26th Avenue?

A. It did not.

Mr. FALKNOR.—You didn't observe it until it was by the stop.

Q. Was the street-car moving rapidly when you first saw it?

A. It was moving rapidly. When I looked it was about the center of 26th Avenue on Cherry Street coming east.

Q. It came on down here at a rapid or a slow rate of speed, which?

A. It came with a very rapid rate of speed.

Q. At about what rate of speed would you think it was coming when it reached the intersection of Cherry and 27th?

A. To look at the two of them, it looked like the street-car speed was very near twice the speed of the auto, say from the distance that the auto had to come and the distance the street-car had to come.

Q. Now, where was the street-car about when you first observed it—I don't mean when you first observed it, but at the time that Mr. Hunt came into Cherry Street [109] about to point "A," tell me about where the street-car was?

A. Well, sir, the street-car when he got down to the point "A" was here. (Indicating). That should be

(Testimony of Allen Smith.)

about maybe ten or fifteen feet east.

Q. The point "A"? A. Yes.

Q. That is about sixteen feet or fifteen feet from the rail, south rail, I think it is.

A. Well, when Mr. Hunt was right in, you might say just about there, the street-car was right in along here some place. I would not say positive just where, but it was running along there.

Q. Along by the apartment-house?

A. Along by the apartment-house.

Q. I wish you would state whether or not there was a team of horses and a wagon in between the rear end of the apartment-house and 27th Avenue, on Cherry Street.

A. They were standing in just this side of the entrance, between these two entrances, because I came out when the gentleman came in. I was making a canvas upon the ladies of the apartment.

Q. You had been in the apartment-house?

A. I had been in the apartment-house.

Q. When you came out the wagon was standing right at the entrance there, where you came out?

A. No, I came out at this entrance up here. (Indicating.) I have figured it out I came out this entrance, and the wagon was standing back in here some place near the big entrance. It was standing somewhere between those two.

Q. Did you observe where the street-car stopped after the [110] accident? A. Yes, I did.

Q. Whereabouts?

A. The street-car stopped just between where a

(Testimony of Allen Smith.)

telephone pole stands and the city water hydrant, I suppose it was.

Q. Indicated on this plat as the point what, "E" or "F"; here is the hydrant and the pole.

A. Right along about there. (Indicating.)

Q. About "E" then?

A. Yes, I guess it was about "E."

Q. The front end was about "F"?

A. I don't know how long it was.

Q. Whatever the distance might be?

A. Yes.

Q. Did you see anyone from the car, either the motorman or the conductor, go back and pick up a part of the street-car after the accident, or did you observe that?

A. I saw it after it was picked up. I didn't see him pick it up. I saw it after it was picked up.

Q. Do you know whether or not the automobile at the time the street-car arrived there had come to a full stop or not? A. Yes, sir; it had.

Q. And about what point, as indicated by "A," "B" or "C," would you say the car was?

A. The car was right down in along here. A little more on the east side of 27th Avenue than it was on this side, coming very near direct straight down at a very low speed and as though as to make the turn. When the car got along in about, say about eight or nine feet, maybe ten feet, something like that, I see Mr. Hunt reach forward, [111] and he swung his car just in about that position, right there, (indicating), and was reaching over in front of his car,

(Testimony of Allen Smith.)

stooped over, when the street-car struck him.

Q. Do you know what part of his car the street-car struck? A. I do.

Q. What was it?

A. It was the outer rim of the street-car. When he swung his car here around he swung it, it looked like, as far as he could. I wondered if he would pass, and the outer rim projected out and caught the wheel.

Q. And then what effect did that have upon the street-car, what position did it assume then, or do you know?

A. The street-car was like this, the front part of the street-car, and when the street-car struck, why I saw the gentleman sitting on the other seat—I guess this gentleman here—I saw him go forward in the car.

Q. What did Mr. Hunt do, did it throw him in any way?

A. Well, I didn't notice. I seen this gentleman go forward that way, and the words I said were, "I will see what it is." The car was standing in about that position when it was struck, (indicating), and when I came over the car was very near perpendicular, not quite straight.

Q. How far back had the automobile been pushed from the tracks when you got over there?

A. From the tracks?

Q. How far away from the south rail of the street-car tracks was the automobile?

A. I would not positively say just how far back it was.

(Testimony of Allen Smith.)

Q. About what?

A. You could see about eight or nine inches.

[112]

Q. I don't mean when it struck the car; I mean after the accident.

A. I mean, after I came over to look at the car.

Q. You think the automobile was about eight or nine inches from the south rail of the tracks when you came over there? A. Just about, yes.

Q. Did you notice at any time when the automobile was going along there whether or not the automobile itself, the wheels were locked and the car was swinging in a way, or skidding?

A. After the car got within about—I was looking directly at it, standing on the next corner—when the car got within about, say eight or nine feet, say eight feet, something like that, why it swung around to the left—when he reached over like that, I suppose for his emergency brake, I suppose—of course, I don't know much about driving an automobile—his car swung like that.

Q. I am speaking of the wheels on the car skidding or sliding; I don't mean turning over, I mean slipping.

A. I don't think they did, because when he reached over he had not much more than reached over until the car was dead. He was eight or ten feet, something like that, when I saw him reach forward, and when he reached forward the car stopped dead, perfectly still.

Q. Now, as the street-car came up there, did you

(Testimony of Allen Smith.)

hear the ringing of any gongs or bells, or anything of that kind?

A. Well, the street-car—

Q. (Interrupting.) If you did, where was it when you heard it first?

A. The first bell I heard— [113]

Q. (Interrupting.) I mean when it got down here, down near the accident?

A. Well, the first bell I heard, I suppose—

Mr. FALKNOR.—We don't want any suppose about it.

A. I know. Just a moment before it struck the auto.

Q. What did you notice about the actions of the motorman at that time?

A. As I was standing on this corner here, when it was coming, when the street-car was right in about here (indicating)—

Q. That is, at the entrance of the apartment-house?

A. Just about. The motorman was looking across in that direction.

Q. You mean what direction?

A. Right across the corner of the street. I suppose he was looking at me, and I waved my hand like that, (indicating), and he didn't take any heed. I thought he was looking at me, and didn't see the auto, and I waved my hand; just about four feet before he hit the auto I saw him swing his arm and the bell began to ring, just about the width of this map before he hit the auto.

(Testimony of Allen Smith.)

Q. Then he went from there, you say, clear down to the point "E"?

A. Yes, between that there hydrant and the telephone pole or telegraph-pole, whichever it is.

Cross-examination.

Q. (By Mr. FALKNOR.)—Let me understand this last. You say the gong was ringing, do I understand you to say the gong was ringing when the street-car was about opposite [114] the entrance?

A. No.

Q. Where was the car, didn't you say it was right in there when you motioned your hand?

Q. Right about there. (Indicating.)

Q. About opposite the entrance of the apartment?

A. Yes.

Q. And you were over here? (Indicating.)

A. I was standing on this corner, at "S."

Q. You motioned your hand at the motorman, because you thought he didn't see the automobile coming?

A. Because I thought he didn't see the automobile coming.

Q. Where was the automobile at that time?

A. The automobile at that time was about eight feet from the track.

Q. He couldn't help but see the automobile if it was out on the street?

Mr. HAMMOND.—That is calling for an opinion.

Q. The street-car is at Cherry, and you are at "S," and you tell this jury that you didn't think the motorman saw the automobile approaching, and therefore

(Testimony of Allen Smith.)

you gave him the high sign? A. I did.

Q. The automobile must have been down by this apartment house somewhere at that time?

A. Right here (indicating), within eight feet. The front of the car was eight feet from the—

Q. (Interrupting.) Do you mean to tell the jury that an automobile was coming right out there on 27th Avenue, and nothing between the automobile and the motorman, and that [115] you gave the motorman the sign that there was an automobile there, because you thought he didn't see it?

A. Yes.

Q. That is right? A. That is right.

Q. If you gave him that sign, you gave it because the automobile was coming at a high rate of speed up 27th Avenue?

A. Going something like between eight and ten miles an hour.

Q. You had been in the house?

A. I just came out.

Q. Where were you going?

A. I went across over there to drop some waste.

Q. Where were you going?

A. I was figuring on working down this side of the street.

Q. You came out of the apartment-house and walked up here, and was going down that street, that was the course you were taking?

A. That was the course.

Q. Your back was to the street-car, and your back was to the automobile?

(Testimony of Allen Smith.)

Mr. HAMMOND.—Just a minute—

Q. Just a minute—in your general course your back was to the street-car and the automobile?

A. No, sir.

Q. But you stopped and turned around, is that the idea?

A. Yes, to throw away some wrapping paper from around a butcher knife and platter, and I turned around and pulled out a package of tobacco and a cigarette paper, and was rolling a cigarette when the gong rang. It was then coming across 26th Avenue.
[116]

Q. You came out of the apartment-house and you were rolling your cigarette as you went along there?

A. No.

Q. And you heard a gong and turned around, and here was the street-car and the automobile coming up the street? A. No.

Q. Do you mean to tell the jury you heard a gong way back here? (Indicating 26th Ave.)

A. Yes.

Q. What was he sounding it for then?

A. Crossing 26th.

Q. Didn't you hear it here?

A. No. It didn't cause me to turn around—if you will listen.

Q. Yes.

A. I turned around. There was a waste-can hanging on this telephone-pole. I had these platters, and they have a paper around them in a little box. I took the paper off the butcher knife and platter,

(Testimony of Allen Smith.)

which I was throwing away, and threw it into that waste can, and I turned around and was looking across the street, because I had been arguing with a woman before about the wrappers. I was rolling that cigarette when the gong rang, looking towards the apartment, thinking of the reason I could not get to call on the tenants—

Q. All this was going through your mind at that time? A. I was standing right on that corner.

Q. Rolling a cigarette?

A. Rolling a cigarette is right.

Q. You saw this automobile coming up 27th Avenue? [117] A. Yes.

Q. And it was over two-thirds down when you saw it? A. No, it was about a third down the block.

Q. I understood you to say two-thirds, about a third of the block?

A. Just about half way between the middle of the block and the corner there.

Q. Then it was about two-thirds of the block, isn't that correct? A. No.

Q. This is half? (Indicating.)

A. Stop midway between the half and—

Q. Then it was three-fourths of the block. You saw this automobile coming about three-fourths of a block away? A. Yes.

Q. Very slow? A. No.

Q. How fast?

A. Between fifteen and twenty miles, to the best of my ability.

Q. Not less than fifteen and not over twenty-five?

(Testimony of Allen Smith.)

A. Not over twenty.

Q. Then the street-car was coming how fast, thirty miles?

A. It must have been coming very near twice as fast.

Q. Then the street-car was coming twice as fast. If the street-car was going twice as fast and it was here, (indicating) it only had to go a block, and this automobile had to go three-fourths of a block. If it was going twice as fast it would get up here before the automobile got there?

A. If the street-car was going twice as fast—
[118].

Q. (Interrupting.) As the automobile it would have passed 27th Avenue before the automobile got there?

Mr. HAMMOND.—That is purely a question of argument.

Q. You don't mean to tell this jury that this street-car was going twice as fast as that automobile, do you?

A. It was running around thirty miles an hour.

Q. Now, don't you know that this block from here to here is about 235 feet—anyway I do not think it is any longer than this block, although it appears on paper. A. That is what I am looking at.

Mr. HAMMOND.—There was no evidence as to the length.

Mr. FALKNOR.—He is assuming.

Q. Anyway you stood there and continued to roll your cigarette?

(Testimony of Allen Smith.)

A. Yes, sir, I was rolling my cigarette when the accident happened.

Q. And you saw the motorman at the front end of the car? A. Yes.

Q. Looking ahead?

A. Looking directly, I thought, at me.

Q. A person on a street-car would have the whole street in his vision? A. He might.

Q. He couldn't help it, could he? You gallantly and generously gave him the high sign, "There is an automobile about five or six or eight feet from your track"?

A. When he was down in here, yes. (Indicating.)

Q. You didn't hear any bell there at all?

A. No bell until before he hit the car.

Q. He did ring the bell?

A. Just before he hit the auto. [119]

Q. Did the auto stop?

A. It just had stopped.

Q. Now, how far was the street-car away when it just had stopped?

A. Well, sir, when he just had stopped there was not but very little space between them.

Q. Then the moment it stopped the collision occurred? A. Yes.

Q. After the collision occurred what happened to the men in the car?

A. Just as the car struck the auto I saw this gentleman here bob up in the car, and the car went on past.

Q. When the impact occurred it occurred back of the front end of the car, didn't it? A. No.

(Testimony of Allen Smith.)

Q. Did the fender hit the automobile? A. No.

Q. The fender did not hit the automobile?

A. No, sir, it was the front of the car that hit the automobile, that is, the outer rim of the wheel, the outer part of the wheel.

Q. Then the other part of the car was between you and the automobile, wasn't it?

A. I could see very plainly right across.

Q. You could look right through the car and see the impact. What newspaper do you represent?

A. I used to work for the P.-I.

Q. You don't work for them any longer?

A. No, sir, I do not.

(Witness excused.) [120]

[Testimony of Thomas F. Bevington, for Plaintiffs.]

THOMAS F. BEVINGTON, produced as a witness on behalf of plaintiffs, being first duly sworn, testifies as follows:

Q. (By Mr. HAMMOND.) State your name.

A. Thomas F. Bevington.

Q. Mr. Bevington, you were in the automobile at the time of this accident at 27th Avenue and East Cherry on the 23d of this month, last year?

A. Yes, sir, I was.

Q. You and Mr. Hunt? A. Yes.

Q. I wish you would take this pointer here and indicate to the jury at the same time, and tell them the circumstances regarding that accident.

A. We were coming down 27th Avenue. I had got in the automobile at my home at 26th and Washing-

(Testimony of Thomas F. Bevington.)

ton. I drove a little ways with Mr. Hunt on 27th, and after we left Mrs. Hunt we probably had four or five blocks to go to the intersection of 27th Avenue and Cherry, where the accident occurred. She left us on 27th Avenue, and Mr. Hunt was showing—

Mr. FALKNOR.—(Interrupting.) I want questions submitted to this witness, questions that I may object to. I want questions put to this witness.

The COURT.—He asked the witness to tell the circumstances.

The WITNESS.—He asked me to tell how it happened.

The COURT.—Proceed.

(Exception noted for defendant.)

A. (Continuing.) Mr. Hunt, back here four blocks, was showing me how he could slow his car down, what he called [121] throttling it down as slow as a couple of miles an hour, and then speed it up to say twenty miles. My recollection is, from the speedometer, this three blocks back he was probably going twenty-two miles an hour, but I don't remember. When he got down on 27th Avenue, approaching the apartment house that is there, which is about 90 feet in width, he commenced to slow down. When he got to where he was approaching the crossing I think he slowed down to about eight miles an hour. We were at about the point "A," where we were sitting—the front end of the car, whatever the distance is, eight or nine feet, was nearer the railroad track—and I saw, I don't know what he saw—I saw a car a street-car, coming. As it appeared to me it was a

(Testimony of Thomas F. Bevington.)

little beyond the west end of the apartment house, the back entrance. It was somewhere near there, between there and the point "D." There was a team, a delivery wagon, with a cover on it, between the two entrances, the back entrance and the main entrance to the apartment house. I didn't observe the car, although I was looking, until I could get vision past that team, and Mr. Hunt then reached forward, and I presume—

Mr. FALKNOR.—I don't want any presumptions, Mr. Bevington.

A. Well, he reached forward and very soon he stopped. I thought he was stopped. He was not any more than stopped, but the way I thought at the time, and do now, he had just stopped.

Mr. FALKNOR.—I move that that be stricken, what the witness thought.

The WITNESS.—That was my judgment.

Mr. FALKNOR.—I don't want judgment, I want facts. [122]

The COURT.—It will be stricken, that part that he said he thought.

Q. Whereabouts did the automobile stop, as near as you can judge?

A. I think the front end of it was just about where "C" is.

Q. And about what interval of time elapsed between the time your automobile got to the point "C" and the time it was hit by the street car?

A. It was almost instantaneous.

Q. At the time you first saw the street-car I wish

(Testimony of Thomas F. Bevington.)

you would state whether or not Mr. Hunt did all that he could do to stop the car?

Mr. FALKNOR.—I object to that unless this witness knows about the mechanism of the automobile, what could be done, unless he is an expert.

The COURT.—Objection sustained.

Q. In what position was the automobile when you first observed the street-car, as being straight ahead or turned at all? A. The automobile—

Q. (Interrupting.) At the time you saw this street-car.

A. The automobile, when I saw the street-car, was just approaching the street, the front of the automobile was half way between that curb line and that center, nearly straight ahead.

Q. About that time what did Mr. Hunt do in operating the car?

A. He turned the car and reached forward for something.

Q. Turned it to the left?

A. Turned the steering gear so that the car went to the left, and reached forward immediately, and then we stopped. [123]

Q. At the time you first saw the street-car then, it was down in somewhere between the entrance, the middle entrance to the apartment house, and the rear of the apartment house?

Mr. FALKNOR.—I object to that as suggestive and leading.

A. I think it was further—

Mr. FALKNOR.—I move that his answer be

(Testimony of Thomas F. Bevington.)

stricken as to what he thinks. He answers everything "I think." I move that the answer be stricken.

The COURT.—Answer the questions without giving conclusions.

A. It was somewhere between "D" and the back entrance, as shown on that map.

Q. Where did the street-car stop after the accident, where was the rear end of the street-car?

A. At the point indicated by "E" on the map.

Q. Is this a thickly settled community in here?

A. There are houses along on 27th Avenue, and a three-story apartment house.

Q. There is a continual row of houses?

A. There is a continual row of houses, and scattered houses.

Q. There is a row of houses on the east side of 27th Avenue here, and some on the west side of 27th Avenue? A. Yes.

Q. Now, did you see Mr. Smith or Mr. Malburn out there that day? A. I did.

Q. Do you know where they were about this time, their relative positions? A. I do not.

Q. At about what rate of speed do you think the street-car [124] was going down Cherry Street at the time it struck you?

A. Twenty-five or thirty miles an hour.

Q. Where did the automobile land after it was struck by the street-car, if you remember; how far back was it pushed or knocked?

A. When it was first struck the front end of it was pushed right around that way. (Indicating.)

(Testimony of Thomas F. Bevington.)

Q. Now, then, what part of the automobile was hit first by the street-car? A. The right wheel.

Q. And then you say what happened?

A. It turned the front of the automobile around nearly square.

Q. What part of the street-car did it strike as it came around? A. The fender.

Q. The fender of what?

A. The right hand fender of the automobile, and the right hand headlight crushed right up against the street-car.

Q. What part of the street-car?

A. The fender struck the front doors, and then the right hand headlight scratched clear along the car back to the boxing on the back trucks of the street-car.

Q. And when it reached the rear end of the street-car then what took place?

A. Then there was another awful bump that sent us back there from the street-car, and clear back several feet from the street-car track.

Q. At this second bump, about whereabouts on the street-car did that occur?

A. Well, two-thirds of the way back, or back as far as the [125] boxing of the back wheel, the back end of the car.

Q. Did you observe the motorman or conductor pick up a piece of the street-car after the accident?

A. Yes.

Q. What part of the street-car was it, and where did he pick it up?

A. A piece of the boxing, and he picked it up near

(Testimony of Thomas F. Bevington.)

the east side of the intersection.

Q. Of 27th Avenue on the south side of Cherry?

A. Yes.

Q. Did you go home with Mr. Hunt after that?

A. I did.

Q. When did you see him again?

A. Well, it was two or three weeks before I saw him again.

Q. Did you observe Mr. Hunt being thrown in any particular way at the time of this accident?

A. I didn't observe much about how he was thrown.

Q. How long afterwards did you see him, did you say? A. Two or three weeks.

Q. How long have you known Mr. Hunt?

A. Oh, I have known him probably fifteen years.

Q. Have you seen him very much just prior to the accident? A. Quite frequently.

Q. How frequently?

A. I saw him every few days.

Q. Prior to that time had you ever observed any illness on his part or sickness of any kind?

A. No, sir.

Q. What did you observe—what have you observed since that time with reference to his general health?
[126]

A. I have observed that he is depressed in appearance, less fleshy and despondent.

Q. Did he ever complain of any aches or pains or illness at all? A. Yes, sir.

Q. What was it that he complained of?

(Testimony of Thomas F. Bevington.)

A. His back and his head and neck.

Q. What part of his head?

Mr. FALKNOR.—I think this is hearsay, and I object to it.

The COURT.—I think so.

Mr. HAMMOND.—I didn't look the matter up—

The COURT.—I don't care to hear any argument. I am satisfied that it is hearsay.

Mr. FALKNOR.—That statement of the condition of a man's health is hearsay evidence.

The COURT.—Yes.

Mr. HAMMOND.—Would it do any good to read a book to Your Honor?

The COURT.—No, I am satisfied this testimony is hearsay.

Q. You say you didn't see him for two weeks afterwards? A. About two weeks.

Q. What else have you observed regarding his physical condition; anything, Mr. Bevington, since the accident, that is different from what you observed before? A. He appears to tire—

Mr. FALKNOR.—I think that is rather expert testimony he is giving, Your Honor.

The COURT.—No, he can tell the comparative condition to the jury, based upon the facts as he understands them or sees them.

(Exception noted for defendant.) [127]

A. He appears to tire, get short of breath, tired with a little exertion. Sometimes his muscles twitch when he is tired making him appear distressed. He has a peculiar tired, hunted look on his face, espec-

(Testimony of Thomas F. Bevington.)

ially when he has exerted himself.

Q. Do you know whether or not the wheels of this car skidded after he came into Cherry Street, or whether or not the car skidded? A. No. I do not.

Q. State whether or not you heard the ringing of any bell or gong or other alarm just at the time you came into Cherry Street, or before?

A. Just about the time that the collision occurred the gong commenced to ring vigorously. Before that I heard no gong.

Q. Did you ever go out and look at this particular car after the accident, with Mr. Hunt? A. Yes.

Q. Did you take any measurement as to the distance the car extends out over and beyond the rail of the track? A. Yes, sir.

Q. About how far, what is the measurement, what distance did this particular car extend beyond the track, beyond that rail?

A. I haven't the memorandum, but as I remember it was about eighteen inches. Mr. Hunt took that memorandum, I didn't.

Mr. HAMMOND.—That is all.

(Whereupon the Court takes an adjournment until to-morrow, September 25, 1914, at the hour of 10:00 A. M.) [128]

Friday, September 25, 1914, 10:00 A. M. Continuation of proceedings pursuant to adjournment. All parties present as at former hearing. Jury polled—all present.

THOMAS F. BEVINGTON, on the witness stand for cross-examination.

(Testimony of Thomas F. Bevington.)

Mr. FALKNOR.—Your Honor, before the plaintiff rests I want to ask a couple of questions of Mr. Hunt and of Mr. Smith, further cross-examination.

The COURT.—Very well.

Q. (By Mr. FALKNOR.) Mr. Bevington, I believe you testified that in this locality where the accident happened it was what you would consider a thickly settled community? A. Well, fairly so.

Q. And there were people working on the streets around there, and people on the street?

A. At that time?

Q. Yes. A. I didn't notice.

Q. You noticed a wagon on the street you say; did you notice this wagon on the street? A. Yes.

Q. That was on the street and the street-car was on the street? A. Yes.

Q. And did you notice the automobile coming down the other way on the street? A. Yes, sir.

Q. So there were people and vehicles on the street around there? [129] A. Yes.

Q. In the vicinity of this crossing? A. Yes.

Q. Now, you say that Mr. Hunt was demonstrating to you what he could do with his car, wasn't he?

A. Yes.

Q. Showing you how slow it could run, and you have a recollection of seeing the speedometer, and going at least twenty-two miles an hour?

A. Yes, sir.

Q. That was not very far from where the accident happened, was it? A. About two blocks.

Q. Well, now, you told him at the time that he was

(Testimony of Thomas F. Bevington.)

violating both the State and city law when he was doing that? A. I did not.

Q. You did not?

Mr. HAMMOND.—If the Court please, it is absolutely immaterial what he was doing two blocks away from this accident.

Mr. FALKNOR.—I want to show the carelessness of this driver.

The COURT.—Cross-examine.

Q. You are an attorney at law, Mr. Bevington?

A. Yes.

Q. You knew that he was operating that car in violation of both the State and city law when he was operating it at twenty-two miles an hour?

A. I knew the limit was twenty.

Q. You knew the limit was twelve miles on the streets of the city, didn't you?

A. I didn't so understand it. [130]

Q. Don't you, as an attorney, know that in an ordinarily settled community the state law limits the speed of automobiles to twelve miles an hour, as an attorney at law don't you know that?

A. No, I think that escaped me at that time.

Q. But you did know that at no place in the city could a man operate an automobile at more than twenty miles an hour?

A. I knew that provision of the ordinance.

Q. And whether he could operate at twenty miles an hour depended on where that would be, whether that would be reasonable under all the circumstances? A. Yes.

(Testimony of Thomas F. Bevington.)

Q. So then you did know that at least two blocks from there he was violating the city ordinance?

A. I knew he was going—in going from little of nothing up to twenty-two miles—his speedometer ran up to twenty-two—he was two miles in excess before he slowed down.

Q. And you said nothing to him about that?

A. No.

Q. Now, at what speed did he attempt to cross East Cherry Street on? A. About eight.

Q. Did you tell him that he was violating the State law when he did that? A. No.

Q. You knew that he was violating the state law when he crossed that intersection at more than four miles an hour, didn't you? [131] A. No.

Q. As an attorney at law, Mr. Bevington?

A. I just said no.

Q. Now, Mr. Bevington, you have had a great deal to do with personal injury litigation, haven't you?

A. I have had considerable experience with personal injury litigation.

Q. As representing both sides of the controversy?

A. Yes, sir, I have represented both sides of the controversy.

Q. And you tell this jury that you didn't know that the state law provided that where there are other people in the vicinity you must not cross another street at more than four miles an hour in an automobile? A. I have just said and repeated—

Q. That you didn't know that?

A. That I was not familiar with this State law, if

(Testimony of Thomas F. Bevington.)

that is the State law.

Q. Now, you were talking to each other about this machine that you are demonstrating, were you not?

A. Yes, we were talking about the machine some.

Q. You were not paying much attention to street-cars, were you?

A. Back two or three—from Yesler Way over until we approached the crossing where there was a street-car track we were not paying attention to street-cars, I was not.

Q. How is that?

A. I was not paying attention to street-cars until we came to the crossing where there were street-car tracks.

Q. Were you looking for street-cars when you came by this apartment house?

A. I certainly was. [132]

Q. As quick as you got by the apartment-house you looked, did you? A. Yes.

Q. And you couldn't see this street-car?

A. I saw the street-car after we passed the corner and we could see by the team that was there.

Q. You say the moment you passed the corner of this house; this line represents the corner of the house? A. Yes.

Q. You were coming up a little to the right of this 27th Avenue. The moment your machine was here (indicating) you began to look for a street-car, and you couldn't see it?

A. I was looking for a street-car both ways, as we approached.

(Testimony of Thomas F. Bevington.)

Q. There was no building to your right, was there?

A. No.

Q. You could just out of the corner of your eye see that there was no street-car coming in the other direction? A. I didn't observe any.

Q. You didn't have to turn your head to see if a street-car was coming from the other direction?

A. Not very much.

Q. You didn't have to turn it at all?

A. Probably not.

Q. Out of the corner of your eye you could see. You knew there were street-cars operated on East Cherry Street? A. Yes.

Q. Mr. Hunt knew that too?

A. I presume he did.

Q. Don't you know that he did?

A. I don't know what another man knows, but I presume, of [133] course, that he did.

Q. The moment you got up here so that you could look around the corner of the house, did you look?

A. I did.

Q. Now, do you tell this jury that you could not see that street-car? A. No, I do not.

Q. Now, why couldn't you see that car?

A. I told the jury how I saw it.

Q. If you looked the moment your line of vision could pass that apartment-house why couldn't you see that street-car?

A. Well, there was a team in there that obstructed the view.

Q. Do you mean to tell the jury that that one team

(Testimony of Thomas F. Bevington.)

obstructed your view of a whole street-car?

A. I mean to tell the jury just what I have said, that it did obstruct my view until we passed the line from the street-car to where we were, past the team.

Q. Then that one team was bigger in your vision than the street-car, is that the idea?

A. No, a team is not bigger than a street-car,

Q. Why did it obstruct your view of the street-car?

A. Simply because it was right between us and the street-car, and I couldn't see through it or over it.

Q. You were up some distance from the ground?

A. I was up the ordinary distance.

Q. Your head was about where it would be if you were standing in the street? A. About.

Q. Now, do you mean to tell the jury that standing in the street there where your vision would pass that building, [134] that that one wagon would obstruct a whole street-car?

A. That is exactly what I have told them and mean to tell them.

Q. That must have been a very big team?

A. An ordinary team.

Q. How far was that car away when you first saw it, Mr. Bevington?

A. It had not approached the back entrance of the apartment-house.

Q. Do you call this the back entrance here where my finger is, or here? (Indicating.)

A. I call the back entrance where you first put your finger.

(Testimony of Thomas F. Bevington.)

Q. There. It had not reached that point yet?

A. No.

Q. And you were at "A" at that time? A. Yes.

Q. And this street-car was about 150 or 180 feet away, is that what you mean to tell the jury?

A. It was somewhere between that back entrance and "D." I think nearer the back entrance.

Q. Then your car went from "B" to "C," didn't it, the front of your car ran from "B" to "C"?

A. Yes.

Q. And your car was going at about eight miles?

A. Yes.

Q. Your car went the distance of twelve feet, didn't it? A. I think eleven or twelve feet.

Q. And the street-car got to "C" about the same instant that the front of your automobile did?

A. We got to "C,"

Q. Didn't you tell the jury that they were about contemporaneous [135] yesterday?

A. I think I told the jury that when we got to "C" and had just stoppel it was only an instant, a short time, a very short time.

Q. As a matter of fact, you both got to the point at about the same time? A. No, we did not.

Q. How much difference in time was there?

A. It was very short.

Q. So short you couldn't measure it?

A. Well, I would not think it was a second.

Q. Then the street-car travelled about, at least 150 feet while your car went twelve feet?

(Testimony of Thomas F. Bevington.)

A. The street-car went from 100 to 175 feet, in my judgment.

Q. While you went twelve feet? A. Yes.

Q. Then the street-car went approximately 96 miles per hour, didn't it? A. No.

Q. How can you figure it out. If the street-car went at least 150 feet while your car went twelve feet, the street-car went more than twelve times as fast as your car, and if your car was going eight miles an hour the street-car must have been going 96 miles an hour, isn't that right?

A. No, that is not right. Your figures are wrong. The street-car going thirty miles would travel about 42 feet in a second, and an automobile going between eleven and twelve miles would go—at eight miles would go between eleven and twelve feet, so your figures are wrong.

Q. While your car went twelve feet the street-car went 150 [136] feet, didn't it?

A. I think somewhere—

Q. Answer my question. Your automobile went twelve feet while the street-car went 150 feet, didn't it, because they both got to the point at the same time?

A. I didn't say it was 150 feet. I said from 100 to—

Q. Well, let us say 100 feet, that is the nearest distance. While your automobile went twelve feet the street-car went 100? A. Yes.

Q. Then how much faster was the street-car going than the automobile. It would be as many times as

(Testimony of Thomas F. Bevington.)

fast as twelve is contained in 100, which would be eight times; that is right, isn't it? And if your car was going eight miles an hour, according to your lowest calculation, it would make the street-car going 64 miles an hour?

A. It is not my evidence, Mr. Falknor, that we were going all that time. I said it took him a little time to get his emergency brake set, and we were stopped for an instant. That would take up part of it.

Q. What part of the street-car first came in contact with your automobile?

A. The iron band in the very front of the car.

Q. Did you hit the fender? A. No.

Q. As a matter of fact, the first part of the car that came in contact with the automobile was several feet back from the front end, isn't that right?

A. No.

Q. You have a claim against the company, too, Mr. Bevington? [137] A. I was injured.

Q. Oh, yes. If you can recover in this case you intend to press a suit against the company too, don't you?

A. Not if I get along the way I think I ought to with Mr. Carson.

Q. But you have a claim you are pressing against the company yourself? A. Not pressing.

Q. Well, you have presented a claim to the company? Now, be frank.

A. I have talked with Mr. Carson.

Q. If you can recover in this case for Mr. Hunt

(Testimony of Thomas F. Bevington.)

you intend to sue for yourself, unless the company digs up, isn't that right?

A. I rather think if you don't pay me something—

Q. You are going to sue?

A. I will be obliged to sue, as much as I regret it.

Q. You are very much interested in Mr. Hunt recovering in this case?

A. Well, I am interested. I don't think overly interested.

Q. Now, you had a talk with the claim agent that day, didn't you?

A. I phoned to the Claim Department that day.

Q. What time did you phone to the Claim Department?

A. As soon as Mr. Atkinson of the Pacific Car Company arrived—he was phoned to first—and then I phoned.

Q. He was the agent of the company from whom the car had been purchased? A. Yes.

Q. He came out and helped bring the car in?
[138]

A. After consultation with him we decided to phone to the Claim Department so they could see the situation just as it was, and we did.

Q. Did the Claim Department ask if anyone in the automobile was hurt?

A. I think whoever talked to me asked me.

Q. What did you tell them?

A. I told them fortunately there was no serious damage.

Q. You said "Fortunately nobody was hurt."

(Testimony of Thomas F. Bevington.)

A. I would not be sure about the language.

Q. You know what you told the Claim Department; you said, "Fortunately nobody is hurt."

A. Mr. Falknor, I told you I do not remember the exact language.

Q. You don't remember whether you told him nobody was hurt or not?

A. I told him, as near as I can remember, that fortunately there was nobody seriously hurt.

Q. Didn't you say, "Fortunately nobody is hurt"; you didn't say anything about "seriously" at all?

A. I think I put it just exactly as I stated it now.

Redirect Examination.

Q. (By Mr. HAMMOND.) With regard to your claim against the Seattle Electric Company, isn't it a fact that you have offered to accept a settlement that was offered by Mr. Carson, provided they would settle Mr. Hunt's claim?

Mr. FALKNOR.—Just a minute, I object—

Mr. HAMMOND.—They have gone into this.

Mr. FALKNOR.—Just a minute. [139]

The COURT.—Just a minute, gentlemen.

Mr. FALKNOR.—I object to any question of that kind.

The COURT.—The objection is sustained as to the offer of compromise.

Mr. HAMMOND.—Well, Your Honor—

The COURT.—I don't care to hear any argument. I am satisfied it is wrong.

Mr. HAMMOND.—You will allow us an exception, please.

(Testimony of Thomas F. Bevington.)

The COURT.—Yes.

(Exception noted for plaintiffs.)

Q. Mr. Bevington, isn't it a fact that Cherry Street, where this accident happened, is the main and the only paved road leading directly from that community out in the Denny Blaine and Madrona districts?

Mr. FALKNOR.—I object to that as immaterial.

The COURT.—He may answer.

(Exception noted for defendant.)

A. It is the main thoroughfare. There may be others paved.

Q. I mean leading directly down to the city?

A. It is the main thoroughfare.

Q. All traffic from that district goes down this Cherry Street?

Mr. FALKNOR.—I object to that as immaterial.

The COURT.—He may answer.

(Exception noted for defendant.)

A. The main part of it.

Q. (By Mr. FALKNOR.) About all the streets are paved out there now coming in are they not, or do you know?

A. I don't know. I don't think so.

Q. You don't know?

A. I don't think they are, Mr. Falknor. [140]

Q. (By Mr. HAMMOND.) State whether or not, Mr. Bevington, it is not a fact that from this point "A" looking west, that a team in front of your vision would make the direction up, and not straight across the top of the horses or the covered wagon?

(Testimony of Thomas F. Bevington.)

A. Slightly, yes.

Q. The street-car would not extend above any covered wagon that might be there from the point where you stood there, or sat in the car?

A. It would not.

Q. (By Mr. FALKNOR.) You were looking at the front end of the wagon, were you not?

A. Yes.

Q. The front end of the wagon was about how wide, five feet wide, four feet wide?

A. About that, four and one-half or five feet.

Q. You were looking at the front of it?

A. Yes, it was standing out a little, probably.

Q. Kind of bulging out a little, was it?

A. I didn't say it was bulging out.

Mr. FALKNOR.—That is all.

Mr. HAMMOND.—That is all.

(Witness excused.) [141]

[**Testimony of Mrs. Mary A. Hunt, for Plaintiffs.**]

MRS. MARY A. HUNT, produced as a witness on behalf of plaintiffs, being first duly sworn, testifies as follows:

Q. (By Mr. BEVINGTON.) State your name?

A. Mary A. Hunt.

Q. Mrs. Hunt, you are the wife of M. A. Hunt?

A. Yes.

Q. One of the plaintiffs in this action? A. Yes.

Q. About what time in the afternoon of September 23, a year ago, did you see your husband?

A. I think it was between two and three, perhaps half past two.

(Testimony of Mrs. Mary A. Hunt.)

Q. Where were you?

A. I was at Mrs. Duvers' at 167 27th Avenue.

Q. What time did you go home from there?

A. We went home early in the evening. I think perhaps eight o'clock.

Q. Prior to September 23, the time of this collision, what was Mr. Hunt's apparent condition of health?

A. He seemed to be in the very best of health.

Q. What was his condition as to being nervous, depressed, or otherwise prior to the accident?

A. Well, I never saw him especially nervous until this last year. His nerves were steady, and he was never depressed.

Q. You may explain to the jury what his condition was as to sleeping or otherwise, as it appeared to you prior to the injury?

A. Well, he always slept soundly, as any well person would.

Q. When he came to Mrs. Duvers that afternoon before you went home how did he appear as to being in pain or distress [142] that afternoon, explain the jury.

A. When he stepped out of the auto—only Mr. Crosby brought him—he didn't seem to be able to handle himself very well, and all the time he was sitting sort of hunched over like an old man, and I noticed him put his hands across him as though he was hurt there. He looked flushed and nervous, and very much excited, and Mrs. Duver had him lay down. He was on the lounge most of the time we were there.

(Testimony of Mrs. Mary A. Hunt.)

Q. Now, when you went home what did he do?

A. When we stepped off the street-car to go to our apartment he fell, pretty nearly fell. I jumped and caught him in time and he put his hand to his back. "Why," he says—

Mr. FALKNOR.—Never mind.

Q. You need not tell what he said, just what he did.

A. I helped him to the door of the apartment and onto the elevator, but it was with difficulty that he got from the elevator to our apartment. He went right to bed.

Q. Then what did he do?

A. He went to bed just as soon as he could get there.

Q. During that night what was his condition as to sleeping or otherwise?

A. He didn't sleep—I am sure he didn't sleep half an hour at a time.

Q. Describe further, without stating what he said to you, describe how he appeared during the night, what his condition was as it appeared to you?

A. He was very nervous and delirious, and the muscles of his arms and face and legs twitched constantly all night long.

Q. When did you call the doctor?

A. Early in the morning. [143]

Q. And who did you call?

A. Dr. J. Warren Richardson.

Q. What did the doctor do for him?

A. He gave him two prescriptions to have filled, one was to be taken internally and the other to be

(Testimony of Mrs. Mary A. Hunt.)

applied externally wherever there seemed to be any pain, wherever he complained of any pain. That is all he did that time.

Q. What was Mr. Hunt's condition, as it appeared to you, during that first four or five days?

A. There were five days when he seemed to be in agony. His face was drawn most of the time as though in severe pain. Those nerve twitchings he had constantly. Sometimes they were worse, and I don't think two hours of any twenty-four he knew much of anything. Part of the time he was really delirious and part of the time just partly so.

Q. Do you remember of anyone calling during that time from the street-car company, and if so, who?

A. Yes, Mr. Lidston was there twice, and Dr. Willis once.

Q. How often did Dr. Richardson come?

A. Well, he came every day of those five days, and I think once or twice he came a second time when I phoned him.

Q. What did the doctor do as to bandaging?

A. I think it was the second day—I had phoned him that Mr. Hunt thought—

Q. You need not tell about phoning, just tell what he did.

A. He came and bandaged him all around with some kind of adhesive bandages.

Q. After those bandages were on a while were they taken off and others put on, do you know?

A. They were on several days, but I don't remember of others [144] being put on, I am sure.

(Testimony of Mrs. Mary A. Hunt.)

Q. Now, from that time on how long was Mr. Hunt confined to his home?

A. He didn't get up or try to get up for a week. He couldn't handle himself enough to do so. About the end of the second week he began to try to crawl around, but didn't dress. I think it was the end of the third week before he was dressed, and either the end of the third week, or early in the fourth week he hobbled with my help to the elevator and went down and sat in the lobby, but didn't try to go out. Well, I think he went out once that week. He might have gone out once the third week, but I think not. But the second month practically he was confined to the flat. If he went out, and he did go once or twice or three times, he was in bed two or three days afterwards.

Q. How did he appear as being lame or otherwise in his back?

A. Oh, he couldn't walk. His back appeared to be lame much longer than that. For several months and even yet when he tried to get up sometimes he would catch himself there as though he can hardly straighten up.

Q. During that four weeks in particular, and ever since, describe to the jury what his condition has been, as it appeared to you, as to being sleepless or otherwise?

A. Oh, he has not slept well for six months. He sleeps very restlessly, would awaken many times in the night and awaken me by his tossings, and the latter six months he has apparently slept much

(Testimony of Mrs. Mary A. Hunt.)

better, but he never wakes up seeming rested. He doesn't act as though he had had any sleep although he has laid there apparently sleeping all night.

[145]

Q. How does he appear when he gets up?

A. He acts as though it was the greatest effort in the world to get out of bed, and get any clothes on and to move around, and he does not seem to be able to make any kind of a quick move.

Q. How does he appear as to being depressed or otherwise?

A. Well, he has been worse at times, but depressed the whole year.

Q. About when was it that he undertook to go to work as a barber, if you remember?

A. He had been home more than five months when he tried to work first.

Q. How long did he work the first time he tried?

A. He worked about two months, short hours, but there were some days during that time that he didn't work, when he was not able to work.

Q. What was his apparent condition when he would come home from work during those two months?

A. He was always all in, at noon or at night, whether he worked one hour or three, and he never worked longer than three at a time, hardly.

Q. Do you know, and if so state, what the fact is as to his losing or not losing weight?

A. Well, he is from fifteen to twenty pounds lighter than he was a year ago, before he was hurt.

(Testimony of Mrs. Mary A. Hunt.)

His face is much thinner and his eyes are hollow.

Q. What effect—describe in your own language, as it appeared to you—has mental or physical exertion had upon him? Just describe that in your own language, during this last year? [146]

A. Well, he does not seem to have the strength of a baby, either mentally or physically. The least little move just tires him out so that he has to lay down, and with mental exertion I think it is more noticeable. It is very hard for him to carry a connected train of thought.

Mr. BEVINGTON.—That is all.

Mr. FALKNOR.—That is all.

(No cross-examination—witness excused.) [147]

[Testimony of Dr. J. Warren Richardson, for Plaintiffs.]

DR. J. WARREN RICHARDSON, produced as a witness on behalf of plaintiffs, being first duly sworn, testifies as follows:

Q. (By Mr. BEVINGTON.) State your name?

A. J. Warren Richardson.

Q. Doctor, are you a regular physician?

Mr. FALKNOR.—I will admit that he is a licensed practitioner, so go ahead.

Q. Doctor, when were you called to attend Mr. Hunt after September 23, a year ago?

A. Either September 23d or 24th, I don't remember which now.

Q. Describe to the jury in your own language the condition that you found him in, as he appeared to you?

(Testimony of Dr. J. Warren Richardson.)

A. Well, Mr. Hunt was in bed when I got there, and he complained of severe pain in the back, at the junction of the three lower ribs on the right side, and also of pain in the spine higher up; and also of pain in the front of the abdomen, just the upper part on the right side, over the region of the liver, and he also complained of some other bruises, that is, pain in the legs, but the great part of his pain was in the back. He complained of headache too, severe headache.

Q. In your examination of him what did you find as to the condition of the 10th, 11th and 12th ribs on the right side?

A. I found that the ligaments were torn on those three lower ribs on the right side, and he was suffering by reason of his pain in that area from traumatic pleurisy. That is, there was some pleurisy developed due to the injury.

Q. The pleura that covers the vitals, and especially the right side, what did you find as to an injury to that? [148]

A. That is what I say; it was injured and caused traumatic pleurisy.

Q. How often did you see him during the first week, say? A. I saw him every day.

Q. And any time more than once a day, do you remember?

A. I don't remember. I think there was once I went twice a day.

Q. Now, during that first week, what, if anything, did you do in the way of bandages?

(Testimony of Dr. J. Warren Richardson.)

A. I strapped this side, either the first or second day, I don't recall just now which, with adhesive plaster strips so as to put those parts at absolute rest.

Q. How long did you leave those straps on?

A. I think it was nine days, and then put on another—reapplied them, a new set.

Q. After nine days?

A. I think it was nine days.

Q. Do you remember how long you left the ones on?

A. I don't remember exactly, but it was about the same length of time. They usually begin to irritate after that time, and you have to take them off.

Q. What was his apparent condition as to being nervous during the four or five days, or sleepless?

A. He was very nervous, and I had to give him something internally to make him sleep, to help him sleep, and I also prescribed some stuff to rub on the outside.

Q. About how long did you continue to go to the house?

A. Well, after the first week I only saw him every second or third day for another week or ten days. Then he came to the office after that. [149]

Q. When he first came to the office what was his apparent condition as to nervousness?

A. He was nervous and weak. While it is a short distance from his place to the office, he would get all in just coming down there. He complained of this severe tired feeling, being nervous, and still having

(Testimony of Dr. J. Warren Richardson.)

trouble in sleeping.

Q. How did he look?

A. Well, he looked pale and depressed.

Q. Did you take his weight from time to time?

A. Yes, sir.

Q. Tell the jury whether he gained or lost weight?

A. He lost somewhere around twelve or fourteen pounds.

Q. Do you remember about when it was, the last time you saw him before he went to the ranch?

A. I think that was February I saw him last, February 12, somewhere along there.

Q. What was his apparent condition then?

A. Well, he was weak and very much run down.

Q. What was his appearance as to being weak and run down in February as compared with what it had been before?

A. It was very marked, the difference in the man. He was very much more run down than formerly, and he only weighed then 162 pounds, I believe.

Q. Do you remember whether he had been working any then?

A. I don't think he had worked at all at that time,

Q. You have examined him lately? A. Yes, sir.

Q. On more than one occasion?

A. I examined him about three or four days ago.

Q. Now, assuming that he was in good health on and prior to [150] about eleven o'clock, A. M., September 23, 1913, not suffering from any mental or physical nervous trouble, and on that date at that time he was operating an automobile which was

(Testimony of Dr. J. Warren Richardson.)

struck by a rapidly running street-car, the impact being such as to violently throw him forward against the wheel of the steering-gear of said automobile and then back, and that said Hunt was thereby shocked and strained and bruised and injured, and the injuries to his back and spine, and particularly between the cervical regions thereof, and the 10th, 11th and 12th ribs on the right side of said Hunt were badly bruised and injured; that the pleura covering his vitals, especially on the right side, was badly injured, causing traumatic pleurisy; the said Hunt's abdomen was badly bruised; that for five days thereafter said Hunt was at times delirious and unable to sleep; during said time he suffered great pain in his side and back and neck, and had severe headaches; that he was confined to his home for a period of about four weeks, to his bed most of that time; and ever since said collision said Hunt has suffered with pains in the back of the neck, which were at some times very severe; sore, still are sore, but somewhat improved; during said time and up until the present time said Hunt has suffered with severe headaches, and any considerable mental or physical exertion during all of said times has caused and still causes said Hunt to be tired and nervous and exhausted; when he sleeps he is subject to nightmare, his muscles being inclined to twitch; that he is irritable and despondent; that he has lost from twelve to fifteen pounds in weight; assuming those facts to be true, [151] what, under such circumstances, would you say the plaintiff M. A. Hunt has

(Testimony of Dr. J. Warren Richardson.)

been and is suffering with, if anything?

A. He is now and has been suffering from traumatic neurasthenia, that is what ails the man.

Q. Under the same statement of facts what would you say was the cause of the conditions described?

A. Resulting from the accident.

Q. What would you say, doctor, as to the probable duration of neurotic condition, and the probable permanency of the same, or the chances for recovery?

A. It is impossible to tell the duration of it. It may extend a long time. It may not be permanent. You can't tell.

Mr. BEVINGTON.—That is all.

Cross-examination.

Q. (By Mr. FALKNOR.) It will probably disappear as soon as this suit is over, won't it, doctor?

A. It is possible it might.

Q. Quite probable, isn't it?

A. No, not quite probable.

Q. Quite possible?

A. It is possible that it might.

Q. Is he a nervous man now? A. Yes.

Q. Does he act nervous; look at him, perfectly quiet, isn't he?

A. You can't tell by the looks of him.

Q. A nervous man fidgets around, don't he?

A. Not always.

Q. Usually? [152] A. He might.

Q. Well, usually they do fidget around a good bit in the courtroom, don't they? Did you see any evi-

(Testimony of Dr. J. Warren Richardson.)

dence of nervousness about him since you came in the courtroom? A. Not now.

Q. He seems to be perfectly at ease, don't he?

A. He seems to be now.

Q. Does he look like a sick man to you?

A. You can't tell by the looks of a man.

Q. Does he look like a sick man to you, doctor?
He don't does he?

A. What do you mean by sick man, there are different kinds of sickness.

Q. Does his complexion and face and eye indicate to you that he is a sick man?

A. He don't look as good as he used to.

Q. Does he look like a sick man?

A. You will have to qualify your "sick man," what that means.

Q. He looks like a man in good health, wholly fit that way? A. Not the best of health.

Q. If you didn't know him, never saw him before, and cast your eye on him, and was asked if that man looked like a man in good health, you would say yes?

A. I wouldn't without examining him.

Q. You would not say he looked like a sick man?

A. He don't look as though he had typhoid fever.

Q. You would not say he looks like a sick man.
When did you say you last saw him, doctor?

A. About three days ago.

Q. How many? [153] A. Three days ago.

Q. What was his temperature?

A. At that time?

Q. Yes. A. Normal.

(Testimony of Dr. J. Warren Richardson.)

Q. That indicated he was a healthy man, so far as temperature was concerned? A. Yes.

Q. What was his respiration? A. Twenty.

Q. Was that normal? A. Practically.

Q. Did you take his reflexes? A. Yes.

Q. What were they? A. Practically normal.

Q. That indicated what, doctor?

A. It didn't indicate much of anything.

Q. What did you take them for?

A. I wanted to see if they were normal.

Q. What did you want to know if they were normal for? A. I wanted to know if they were lost?

Q. If they were normal that indicated that his nervous system was all right, didn't it?

A. Not necessarily.

Q. But ordinarily that is what you take them for?

A. No, I wanted to see if the reflexes were lost.

Q. If those reflexes had been exaggerated or gone that would have indicated that his nervous system was out of order?

A. That would have indicated an entirely different condition. [154]

Q. In neurasthenia you find the reflexes exaggerated, don't you? A. Not very often.

Q. Isn't that the first symptom that you look for in neurasthenia, exaggerated reflexes? A. No.

Q. You tell this jury, as a practitioner, now, doctor, that in genuine cases of neurasthenia—not those that simply exist until the trial is over and then disappear—but in genuine cases of neurasthenia, that the reflexes are not exaggerated?

(Testimony of Dr. J. Warren Richardson.)

A. Yes, I will tell them that.

Q. Generally they are exaggerated?

A. Not unless there is some acute condition in the spinal cord.

Q. You took the eye and patellar—how many did you take?

A. I took his eye reflex and the patellar.

Q. Did you take the ankle? A. Yes.

Q. You took them all from the head to the foot?

A. Yes.

Q. And you found them all normal?

A. Practically normal.

Q. Didn't that indicate that he had no neurasthenia? A. No, it did not.

Q. Didn't it indicate that his nervous system was O. K.? A. No.

Q. What symptom did you find that indicated neurasthenia? A. Well, the man was run down.

Q. What was run down?

A. The man was run down.

Q. The man was run down? [155]

A. He couldn't hardly stand examination.

Q. How did you know—that was subjective, wasn't it, that was purely subjective, you had to take his word for that?

A. Not entirely. I took the man's weight. He is not up to the usual weight.

Q. How much does he weigh? A. 162 pounds.

Q. Isn't that a good weight for a man of his height? A. It is not his usual weight.

Q. How do you know?

(Testimony of Dr. J. Warren Richardson.)

A. Before the accident he weighed—

Q. (Interrupting.) How do you know he did, did you ever weigh him before the accident? A. No.

Q. You don't know whether that is his usual weight or not? A. Absolutely not.

Q. That may be his usual weight, might it not?

A. I don't believe it is.

Q. Then that is subjective? A. Yes.

Q. What objective sign, that is, not anything that he told you, that you had to depend on him—what objective sign did you find that he had neurasthenia; not a one, did you, doctor?

A. You have to depend on the objective symptoms a good deal.

Q. Every objective symptom was against what he told you, wasn't it? A. No.

Q. What objective symptom was not against what he told you?

A. Well, the reflexes didn't bear it out. [156]

Q. His reflexes disproved what he told you, so far as they spoke; he couldn't control them, could he?

A. No.

Q. That is involuntary? A. Yes.

Q. What objective sign did not speak against what he told you; his temperature was all right?

A. Yes.

Q. And his respiration was all right? A. Yes.

Q. The reflexes were all right? A. Yes.

Q. Did you take his blood pressure?

A. I did not, no, sir.

Q. You didn't take that? A. No.

(Testimony of Dr. J. Warren Richardson.)

Q. But everything you did take was against what he told you, wasn't it, doctor? A. Yes, sir.

Mr. FALKNOR.—That is all.

Mr. BEVINGTON.—From your examination, the result of which you have related here, is it your judgment that he is still suffering with that neurosis?

A. Yes, sir.

Q. (By Mr. FALKNOR.) If he was suffering what would happen to his temperature?

A. It would not affect his temperature, necessarily.

Q. Necessarily; ordinarily suffering affects the temperature, doesn't it—I don't mean the temperature, I mean his heart-beats; you took his pulse, did you? [157]. A. Yes.

Q. Was that normal? A. Yes.

Q. That was normal. Now, when a man is suffering, when he is in pain, what effect does that have upon his pulse? A. Sometimes it runs it up.

Q. Not sometimes, but generally runs it up?

A. Generally, but not always.

Q. Did his pulse rate go up?

A. After the examination?

Q. Before or after, or during, or any time?

A. No.

Q. Remained the same. Did you press on his body? A. I did.

Q. Now, isn't it true that if a man is suffering pain and you begin to press on those parts that are painful it sends the pulse rate up? A. Not always, no sir.

Q. It generally does? A. It often does.

Q. Did it in this case? A. No.

(Testimony of Dr. J. Warren Richardson.)

Q. Then so far as the pulse rate spoke, and a man cannot control that, can he doctor? A. No.

Q. You cannot control your pulse rate, that is an involuntary action; and so far as that spoke it was against what he told you?

A. So far as that was concerned.

Q. Did he have any fractured ribs? [158]

A. No.

Q. Did you take an X-ray? A. No.

Q. Why didn't you take an X-ray; you didn't think his ribs were hurt enough to take an X-ray picture?

A. I didn't consider his ribs were fractured.

Q. Were there any abrasions on his body?

A. No, sir.

Q. The skin was not broken any place, even?

A. No.

Mr. FALKNOR.—That is all.

(Witness excused.) [159]

[Testimony of Dr. R. France, for Plaintiffs.]

Dr. R. FRANCE, produced as a witness on behalf of plaintiffs, being first duly sworn, testifies as follows:

Q. (By Mr. BEVINGTON.) State your name.

A. R. France.

Q. Doctor, you are a regular practitioner?

Mr. FALKNOR.—I will admit that the doctor is a licensed practitioner. He looks like it, anyway.

Q. Doctor, are you in the same suite of offices with Dr. Richardson? A. Yes, sir.

Q. Have you met Mr. Hunt?

(Testimony of Dr France.)

A. I have met Mr. Hunt, yes, sir.

Q. Doctor, assuming as true that the plaintiff—I will ask you this, were you sitting back here so that you heard the question, the hypothetical question I read to Dr. Richardson? A. Yes, I heard it.

Q. Assuming the facts in that question as read to Dr. Richardson to be true, what would you say, under the circumstances, the plaintiff M. A. Hunt has been and is suffering with, if anything?

A. He is probably suffering from traumatic neurasthenia.

Q. And under the same state of facts what would you say was the case of the condition described?

A. Probably due to an injury.

Q. What would you say as to the probable duration of that neurotic condition? Describe the probable permanency of the same, or the chances of recovery.

A. The majority of them recover. Perhaps two-thirds of them [160] will recover, and the other third may recover only in part.

Mr. BEVINGTON.—That is all.

Cross-examination.

Q. (By Mr. FALKNOR.) Most of them recover right after the litigation, don't they?

A. After the litigation is over helps these cases a lot.

Q. When they quit trying to get money they get well?

A. Litigation in these cases is bad for them. It is one of the external stimulants that mitigates

(Testimony of Dr France.)

against the recovery of these people, and the longer the case is in litigation, the more it is kept up, the more these people have to be examining themselves and thinking about it all the time, why the worse it is for the case. Litigation never does these people any good.

Q. When they get away from the doctors and lawyers they get well. A. It helps.

Mr. FALKNOR.—That is all.

(Witness excused.)

Mr. BEVINGTON.—We rest.

Mr. FALKNOR.—As I requested, I want to ask Mr. Hunt and Mr. Smith some questions. [161]

[Testimony of M. A. Hunt, for Plaintiffs (Recalled).]

M. A. HUNT, recalled as a witness on behalf of plaintiffs for further

Cross-examination.

Q. (By Mr. FALKNOR.) Mr. Hunt, did you not also while you had this automobile have a head on collision, where you ran into another automobile ahead of you? A. No, sir.

Q. Did you not run into another automobile and break one of your headlights?

A. No, sir, I never did.

Q. Did you not run into something and break one of your headlights?

A. I did run into something and break one of my headlights, but it was on account of grease running into the brakes.

(Testimony of M. A. Hunt.)

Q. Something got wrong with your brakes?

A. That was the car's fault, and not mine.

Q. Anyway you did run into something that was ahead of you at some other time? A. Yes.

Q. Something got wrong with your brakes?

A. The grease ran into the brake-wheel and I had no pressure on my brakes. I couldn't stop the car. I didn't know it.

Q. You had been driving all day?

A. It just ran out.

Q. It ran out just as you saw that other automobile, or whatever it was? A. It just ran out.

Mr. FALKNOR.—That is all.

(Witness excused.) [162]

**[Testimony of Allen Smith, for Plaintiffs
(Recalled).]**

ALLEN SMITH, recalled as a witness on behalf of plaintiffs for further Cross-examination.

(By Mr. FALKNOR.) Mr. Smith, what are you doing now? A. I am employed by the Sun.

Q. You are employed by the Sun? A. Yes, sir.

Mr. FALKNOR.—That is all.

(Witness excused.)

Mr. HAMMOND.—That is all.

The COURT.—The plaintiff rests?

Mr. HAMMOND.—Yes.

Here the plaintiff rests. [163]

[Testimony of Dr. Park W. Willis, for Defendants.]

Dr. PARK W. WILLIS, produced as a witness on behalf of defendant, being first duly sworn, testifies as follows:

Q. (By Mr. FALKNOR.) State your name?

A. Park W. Willis.

Q. You are the physician of the company?

A. Yes, sir.

Q. And have been for a good many years?

A. Yes.

Q. And as the physician of the company did you call on Mr. Hunt? A. Yes, sir.

Q. Did you examine him? A. Yes.

Q. Tell the jury what, if anything, you found the matter with him, doctor?

A. Well, as far as what I found, I didn't find anything.

Q. Could you find anything the matter?

A. I couldn't find anything.

Q. What did you do, explain to the jury what you did?

A. I asked him about his injury and how he was hurt, and what he did immediately following, and how he felt, and about his pains and when they came on, and what his condition was, and then I examined his body and his general condition as he was lying in bed, just as I would any patient making any complaint.

Q. What was your conclusion from that examination, as to his ailment?

(Testimony of Dr. Park W. Willis.)

A. I didn't believe he was hurt to amount to anything.

Mr. FALKNOR.—That is all. [164]

Cross-examination.

Q. (By Mr. BEVINGTON.) How long after the injury was it that you called upon him?

A. I saw him on September 25th, I think. He was injured on September 23d.

Q. He was in bed? A. He was.

Q. Did he tell you what doctor was treating him?

A. Yes, sir.

Q. Dr. Richardson? A. Yes, sir.

Q. Did he have adhesive bandages on him?

A. Yes, sir.

Q. Do you know what they are usually put on for?

A. Yes.

Q. What?

A. They are put on for various things. Usually when they are put on the side where these were it is on account of pain from which the patient complains.

Q. Pains from which the patient complains?

A. Yes.

Q. It would be natural to put them on if the ligaments of some of the lower ribs were injured or torn, wouldn't it?

A. Yes, sir. They would be put on then. They would be put on for anything that caused any pain when the side was moved, whether it was moved in breaking or anything else. Adhesive plasters on there holds it so that it keeps it from hurting. That

(Testimony of Dr. Park W. Willis.)

is the whole theory.

Q. Did you ever talk to Dr. Richardson about that? .[165]

A. I don't know. I think I did, probably, but I don't remember now specifically. I could not tell you definitely.

Q. You never have seen him since? A. No.

Q. You never went back to see him?

A. No. I simply examined him to report to the company the extent of his injuries.

Q. It is your duty to go and examine them?

A. When I am asked to.

Q. And get a statement and turn it in to the company?

A. Make my statement to the company, that is my duty, to make my statement to the company as to the extent of the injuries of the individual.

Redirect Examination.

Q. (By Mr. FALKNOR.) Did you see any indication of pleurisy? A. No.

Q. Did you see any indication of torn ligaments?

A. No.

Q. What would have been the symptoms if either of those things existed?

A. Well, with torn ligaments about the ribs they would probably have been where they would have interfered with his respiration and made his breath short, so that he would have had frequent breathing, and more or less difficulty in breathing, and then, too, if there were torn ligaments he would have been tender in one particular place where those ligaments

(Testimony of Dr. Park W. Willis.)

were. In this case he complained of his tenderness everywhere. I couldn't touch him anywhere that [166] he did not complain of tenderness, and he complained when he moved, and the place where he said he was hurt was down either over the very last floating rib or just below the ribs. It really seemed to me, as near as I could tell, entirely below the ribs, and certainly at the most not more than over the last floating rib, which is a very difficult rib to injure in the way of tearing ligaments or anything of that kind.

Mr. FALKNOR.—That is all.

(Witness excused.) [167]

[Testimony of H. J. Graff, for Defendant.]

H. J. GRAFF, produced as a witness on behalf of defendant, being first duly sworn, testifies as follows:

Q. (By Mr. FALKNOR.) State your name?

A. H. J. Graff.

Q. You were the motorman in charge of the car in question? A. Yes.

Q. How long have you been in the employ of the company?

A. Well, a little over a year here in Seattle. I have been employed about six years altogether with the Stone-Webster Company.

Q. You have had railroad experience for about six years? A. Yes, sir.

Q. Now, you were there, Mr. Graff, I will ask you—you go ahead and tell the jury just how this accident happened.

A. Well, we were going east on Cherry Street, and

(Testimony of H. J. Graff.)

we stopped at 26th Avenue. That was our last stop.

Q. You made a stop at 26th Avenue? That was the street before?

A. Yes. We let off two foreigners there, laborers working on 26th Avenue, which was torn up and closed up to the public there.

Q. On which side of 26th Avenue did you stop, on the west side or east side? A. On the west side.

Q. Now, go ahead.

A. And I pulled out from there, and I had my car speeded up to full speed, and there was not a soul in sight when we come to 27th, not a team. But after I got about ten or fifteen feet of the corner of the apartment house—

Q. That is, the front of your car was ten or fifteen [168] feet from this apartment house?

A. Yes. The automobile come in view. I should say we both saw one another about the same time.

Q. The front of your car was about ten or fifteen feet west of the apartment? A. Yes.

Q. And then the automobile came in view?

A. Yes, he was about thirty feet from the curb.

Q. And the automobile was down here about thirty feet from the curb? A. Yes.

Q. At that time. Now, about what speed was the automobile running?

A. He was running, I should judge, between 25 and 30 miles an hour.

Q. Now, you go ahead?

A. And I got probably about 20 feet past the apartment house, and he passed me, he passed the

(Testimony of H. J. Graff.)

front end of my car, and I thought he was going to make it all right.

Q. What did he do?

A. He turned his car west, and his car skidded from the time I saw him until he struck the street-car. The marks of his skidding stayed on the street for a week afterwards.

Q. He turned to the left?

A. Yes, sir, he turned to the left.

Q. Where did the automobile hit the street-car?

A. It struck it about six feet from the end of the car, that is, excepting the fender. He never touched the front end of the car at all?

Q. Now, when you saw him coming you say you were about ten [169] feet west of this apartment house; what did you do?

A. I threw off my power and set the emergency immediately.

Q. Is that the proper way to stop your car?

A. Yes.

Q. Where did your car come to a stop?

A. It was not quite to the curb on the east side of 27th.

Q. The back end of your car? A. Yes.

Q. The back end of your car was not quite to this curb; which way, from there on, or to the west of it?

A. It cleared 27th Avenue. It didn't quite clear the curb.

Q. That is, the back end of your car cleared 27th?

A. No, it didn't clear it.

Q. Do you mean the paved portion or the side-

(Testimony of H. J. Graff.)

walk? Did it clear the paved portion, the back end of your car? A. I mean the curb on 27th.

Q. It didn't quite clear the curb? A. No, sir.

Q. The front end of your car went on up so that the rear end of your car did not quite clear the curb?

A. No.

Q. What did you do after that?

A. We got off the car right away and we went back and asked them if they were hurt.

Q. You asked the people in the automobile?

A. They said they were not hurt, and Mr. Hunt said he done all he could do. That is the very words.

Q. Did his automobile come to a stop before the impact with your car?

A. No, sir. I passed the car. I thought he was going to [170] make it all right, and then I heard him.

Q. When he made this circuit around here and the car skidded, about what speed was he going at the time the car skidded there?

A. Well, I don't know hardly what speed he was travelling at. His car was skidding. He was traveling at a greater rate of speed than I was.

Q. It was going faster than the street-car?

A. Yes, because he met me quicker than I expected. It was not more than four or five seconds after I saw him until he struck the side of the car.

Q. You are still in the employ of the company?

A. Yes.

Q. About what speed was your car going up that street?

(Testimony of H. J. Graff.)

A. I would judge I was running about fifteen miles.

Q. You were running about fifteen miles?

A. Yes.

Q. Is it level or slightly up grade?

A. It is practically level right there, might be a little up grade.

Cross-examination.

Q. (By Mr. HAMMOND.) It was four or five seconds, you say, after you saw Mr. Hunt before he struck your car? A. Yes.

Q. And you were going at the rate of fifteen miles when you saw him? A. Yes, sir.

Q. You saw him about ten feet— [171]

A. (Interrupting.) It was about ten feet west of the apartment.

Q. West of the east end of the apartment house. How many feet do you think it was? You say ten feet west of the apartment house before you saw him, or when you saw him you were—

A. I was about ten feet, ten or fifteen.

Q. Did you say you were going fifteen miles?

A. I was going somewheres in that neighborhood, fifteen.

Q. Did you ever test that car out to see how quick you could stop?

A. I never tested any street-car out, but the capacity of a common street-car—you can not get any more than 25 miles out of them, and you have to have five or six miles to do that.

Q. How soon can you stop a car, in how many feet

(Testimony of H. J. Graff.)

can you stop a car going at the rate of fifteen miles?

A. That is according to the condition of the rail, it all depends on the rail.

Q. Assuming it is a dry, smooth rail?

A. Well, you couldn't tell whether it was a smooth rail or grease on the rail.

Q. Now, then, you know what the condition was, whether it was a smooth rail. I am not talking about whether this was dry, or grease, or what it was, I am talking about a nice, dry rail with no grease on it. How soon can you stop a car going fifteen miles?

A. You can probably stop in the length of itself.

Q. How long was this car?

A. It is about 38 feet.

Q. You could not stop it sooner than the length of itself? [172]

A. I don't know. I never had no occasion to stop a car that way.

Q. How soon can you stop it going 25 miles, in how many feet could you stop it?

Mr. FALKNOR.—I object. The witness has testified he never made any tests of that kind.

The COURT.—He may answer.

(Exception noted for defendant.)

A. I never had no occasions to stop a car running 25 miles. I don't know—that is, to fetch a car down right away, right immediately with the emergency. I never had that experience yet.

Q. Give us what your experience has been; do you know anything about it at all, as to how soon you can stop a car?

(Testimony of H. J. Graff.)

A. Running 25 miles an hour I would want at least half a block to stop my car.

Q. Then if a car was going 25 miles and you need half a block to stop in, you would go about 300 feet, or about 200 feet before you could stop it, is that right?

A. Well, it would not be necessary. If you had to stop immediately probably you could stop quicker than that, but to fetch your car down for a safety stop for passengers to alight, you would take probably half a block, so you would not jar them and shake them up in making the stop.

Q. But you are just as positive that you were within ten feet of the east side of that apartment house when Hunt came out into the street?

A. That is as near as I can judge. It was ten or fifteen feet.

Q. Where was that located with reference to this—

A. (Interrupting.) He was on the west side of 27th Avenue. [173]

Q. How far down 27th Avenue to the south?

A. To the south?

Q. Yes, how far down 27th to the south, how close was he to Cherry Street when you first saw him?

A. He was probably about two feet from the curb on Cherry Street going north.

Q. Out in Cherry Street? A. Yes.

Q. He was probably two feet north of this line? (Indicating.)

A. He was two feet from the curb.

Q. Two feet from the curb? A. Yes.

(Testimony of H. J. Graff.)

Q. North of the curb out in Cherry Street?

A. West of Cherry Street.

Mr. FALKNOR.—He is speaking of his position on 27th.

A. I mean he was running—

Q. Come down here and show me where he was. Point out on that map where he was about when you first saw him?

A. He was about thirty feet from this curb. (Indicating.)

Q. Which way?

A. From the sidewalk curb, right about in here. (Indicating.)

Q. He was thirty feet back here; the front end or the rear end?

A. The front end. I could see the whole car.

Q. And you saw the whole car when he was thirty feet, right here? A. Yes.

Q. Thirty away from here? A. Yes.

Q. And you were ten feet from here? (Indicating.) A. I was ten or fifteen feet. [174]

Q. Going at the rate of 25 miles, and you want this jury to believe that he ran out there and ran into your car?

A. He was right about in here. (Indicating.)

Q. Where the "C" is marked, that is about where he met you. Now, then, do you want this jury to believe that you saw Hunt's car thirty feet south of Cherry Street on 27th Avenue when you were ten feet west of the apartment house, and that he ran down there and hit your car six feet back of the cen-

(Testimony of H. J. Graff.)

ter, is that what you want this jury to believe?

A. Yes, sir.

Q. Did you go back and pick up that piece of boxing?
A. I picked up a journal cover.

Q. It is what covers that boxing where the wheels are?
A. Yes.

Q. How far did you go back to pick that up?

A. That was lying between the car and the auto.

Q. How far back did you go?

A. I was standing right at the car.

Q. Standing right at the car?

A. Yes, I didn't walk back at all.

Q. What do you mean, the automobile or the street-car?

A. Between the automobile and the street-car.

Q. How far did you have to go before you picked up that journal cover?

A. Well, I picked it up right about in front—it was between the auto and the car. It was lying practically right where they struck.

Q. Now, how far did you have to go back to pick that up?
A. From the front end of the car?

Q. Yes. [175] A. I judge about sixty feet.

Q. Then it laid about thirty feet, twenty-four feet west of the rear end of your car?

A. It was lying between the car and the auto.

Q. I understand, you said that before. I want to get the distance.

A. As near as I can judge it would be somewheres near sixty feet.

(Testimony of H. J. Graff.)

Q. You had to walk back sixty feet to get that journal cover?

A. I didn't walk back to get it. It was lying there when I got ready to go.

Q. How did you get back there?

A. I walked back to see if any of them were hurt.

Q. When you walked back you brought the journal cover back with you, and you walked sixty feet to get it?

Mr. FALKNOR.—He has answered that a half a dozen times.

Mr. HAMMOND.—Let us have him answer it again.

Mr. FALKNOR.—I object to it.

Q. How far beyond the journal cover was the automobile?

A. It was lying practically right by the automobile, between the automobile and the street-car, the rear end of the street-car.

Q. You think it was four or five seconds from the time you saw that automobile until you hit?

A. It was an awful short time.

Q. Four or five seconds?

Mr. FALKNOR.—I object to this. He says an awful short time. Nobody can figure out seconds.

Q. That is what you said it was.

A. I said I could not judge what time it was. It was an awful short time. [176]

Q. You say that after counsel told you, but you said a while ago it was four or five seconds, didn't you? A. Yes.

(Testimony of H. J. Graff.)

Q. That is the fact?

A. It was an awful short time, I know.

Q. Who was it you let off here at 26th Avenue?

A. I let off two laborers working on the streets, 26th Avenue, off the front end of the car.

Q. Didn't you say they were foreigners?

A. Yes, sir.

Q. What street were they working on?

A. On 26th Avenue.

Q. What were they doing there?

A. I don't know what they were doing. They were paving the street at that time.

Q. Did you go back the next day to find them?

A. No, sir, I never went back.

Q. Did they get off at the end of the car?

A. Yes, sir, the front end.

Q. And you are sure they were working on the street there?

A. I think they were. I think they went towards the street.

Q. Are they here in the room now?

A. I couldn't recognize them. I couldn't say whether they are here in the room or not. I never saw them before or since.

Q. You think you were going at least fifteen miles an hour when you reached the apartment house?

A. I don't think I was running over fifteen.

Q. You didn't see any team and horses?

A. I saw a dump-wagon driving up after the accident. [177]

(Testimony of H. J. Graff.)

Q. You didn't see a delivery wagon right here?
(Indicating.)

A. I don't remember a delivery wagon. The track was clear. I didn't see anybody and I didn't get no bell to stop, and I was going on through. There was nobody there to get on.

Q. You knew that was a dangerous corner?

A. Yes, sir, but I was not speeded up and everything was clear. There was practically nothing on the street.

Q. You know, as a matter of fact, that until you get down here (indicating) you can't see ten feet, you can't see five feet beyond that apartment house down 27th Avenue?

Mr. FALKNOR.—I object to that as a matter of argument.

Mr. HAMMOND.—He can tell what he can see. He goes by every day.

Mr. FALKNOR.—It is a matter of argument.

The COURT.—I think the ground has been pretty well covered, but he may answer the question.

Mr. FALKNOR.—Besides, your Honor, under the city ordinance we have the right of way over automobiles and vehicles.

Mr. HAMMOND.—You don't have the right of way over anything.

The COURT.—He may answer the question.

(Exception noted for defendant.)

Q. Can you answer how far beyond this apartment you could see anyone when you are down here at the rear? (Indicating.)

(Testimony of H. J. Graff.)

A. About ten or fifteen feet, you can see probably thirty feet up on 27th.

Q. Thirty feet down this way? (Indicating.)

A. Yes.

Q. Now then, you can see thirty feet down this way?

A. That will give you, from the car track, that will give you [178] about thirty feet of view.

Q. Thirty feet. I am taking this point right here at the corner of the apartment house, and taking you down here at the entrance to the apartment house. How many feet south of this apartment house could you see anything?

A. How many feet down here? (Indicating.)

Q. Before you could see any object?

A. From where I was I could see—when he first came in sight he was about thirty feet from the curb.

Q. From this curb here? (Indicating.)

A. Yes.

Q. Thirty feet down 27th? A. Yes.

Q. And you were ten feet from—

Mr. FALKNOR.—They have been over that so many times, your Honor.

Q. You were ten feet from 27th Avenue?

A. Somewhere in the neighborhood, ten or fifteen feet.

Q. Where did he commence to skid his tires?

A. From the time I first saw him until he struck the street-car his car skidded.

Q. Thirty feet south of 27th Avenue his car commenced to skid?

(Testimony of H. J. Graff.)

A. Yes. They skidded until they struck me.

Q. And he was skidding right into your car?

A. No, sir. I thought he was going to miss my car.

Q. Was he skidding when he struck your car?

A. I could not tell whether he was skidding or not, but his marks on the street showed it afterwards.

Q. Then you don't want the jury to understand that he was skidding? [179]

A. I couldn't say whether he was skidding or not, but the tire marks—

Q. All you know is that afterwards you saw some tire marks there, is that it? A. Yes.

Q. You don't know whether he was skidding or not?

A. Those tire marks will show whether the wheels were turning around. If they are turning there are no marks.

Q. Certainly there are marks.

A. They are not black marks.

Mr. FALKNOR.—That is a matter of argument, and I object.

The COURT.—Proceed.

Q. You didn't see that the wheels were not turning?

A. I didn't have time to see. I couldn't see whether the wheels were turning or not, no, sir.

Q. You want the jury to believe that it took—he skidded down 27th Avenue thirty—forty—forty-eight feet and hit your street-car six feet back of the front entrance, while you were going ten feet at

(Testimony of H. J. Graff.)

the rate of fifteen miles an hour?

Mr. FALKNOR.—I object to that. That is not fair, because he said he was ten or fifteen feet beyond this apartment house.

Q. All right, while you were going twenty feet, then, is that what you want the jury to believe?

A. Well, it is just as I explained it to you.

Q. As a matter of fact, you didn't see him at all, did you? A. Yes, sir, I saw him.

Q. You didn't see him until you got right up there and was about to hit him?

A. No, sir. He had time to turn, and came very near missing me. [180].

Q. (By Mr. FALKNOR.) How about the sounding of the gong as you came up?

A. I commenced to sound my gong just as I left 26th Avenue, for I was going right through. There was no stop and I never got no bell, and I sounded my gong the whole distance.

Q. (By Mr. HAMMOND.) You say you did sound it? A. Yes, sir.

Q. Now, is it not a fact, Mr. Graff, that after the accident happened you were talking to Mr. Hunt, and Mr. Hunt—is that a fact?

A. No, sir, I didn't talk to him. The "Con" asked him if he was hurt and he said no. He said, "I done all I could do." That is all I talked to Mr. Hunt.

Q. Isn't it a fact that Mr. Hunt said to you, "Why did you run down there at that rate of speed and not try to stop or ring a bell until you hit me?"

A. Mr. Hunt never said anything to me of that kind.

(Testimony of H. J. Graff.)

Q. And you simply said, "I didn't see you."

A. Mr. Hunt never talked to me.

Q. That conversation did not take place?

A. Mr. Hunt never spoke to me. He never talked to me at all on the subject.

Q. And you didn't to him? A. No, sir.

Mr. HAMMOND.—That is all.

(Witness excused.) [181]

[Testimony of J. Boehn, for Defendant.]

J. BOEHN, produced as a witness on behalf of defendant, being first duly sworn, testifies as follows:

Q. (By Mr. FALKNOR.) State your name?

A. J Boehn.

Q. Mr. Boehn, you were a passenger on this car?

A. Yes, sir.

Q. You are here under subpoena? A. Yes, sir.

Q. Where were you riding in the car, Mr. Boehn?

A. Why, I was sitting—

Q. Where were you sitting?

A. I was sitting on the front seat, the long seat. That is, the side seat up towards the front, my daughter and myself.

Q. You were sitting on the side seat on the left-hand or right-hand side as you went out?

A. The left-hand side going out.

Q. You were sitting on the left-hand long seat in the front of the car? A. Yes.

Q. You were facing, then, toward the south?

A. Yes.

Q. You were on the car, Mr. Boehn, at the time of the accident? A. Yes.

(Testimony of J. Boehn.)

Q. And you were facing in the direction from which the automobile came? A. Yes.

Q. Now, at about what speed was the street-car running, Mr. Boehn? [182].

Mr. HAMMOND.—If the Court please, this gentleman has not shown even the slightest qualification.

The COURT.—I think that is right.

Q. (By Mr. FALKNOR.) You ride in automobiles sometimes, do you? A. Yes.

Q. And have observed the speedometers?

A. Yes, sir.

Q. And you have ridden in street-cars and other cars? A. Yes.

Q. Now, I will ask you, Mr. Boehn, at about what speed the street-car was going when you came up to 27th Avenue?

A. Oh, not to exceed over fifteen miles.

Q. Did you see the automobile? A. Yes.

Q. Before it collided with the street-car?

A. Yes.

Q. Where was the automobile, Mr. Boehn, as you sat looking out the window, where was the automobile?

A. It was coming north, I believe you would call it, on 27th Avenue. I believe I saw the automobile before the motorman did.

Q. How far was the motorman away?

A. About 150 feet, probably 200 feet.

Q. What speed was the automobile coming?

A. Well, it was coming, that is, I should say—

(Testimony of J. Boehn.)

Q. As compared with the street-car?

A. It was coming a good deal faster than the street-car.

Q. What happened? Go ahead, you were there?

A. I saw the automobile—my daughter and I both saw it at the same time. She is not here—that don't make any [183] difference—I saw it and turned to look at the motorman, and just as I turned to look at him—that is, my head—he slapped on the brake, and of course I couldn't get up—I didn't get up and look over to see where he hit the car or anything, but I heard the slap.

Q. Where did the impact between the street-car and the automobile appear to you to be?

A. Where did it hit the street-car?

Q. Yes.

A. Right back of the first door on the right-hand side. He hit the second door, the double doors, I could see a mark there.

Q. Did the automobile come to a stop before it hit the street-car? A. I didn't see it.

Q. Was there anything to prevent the man in the automobile from seeing the street-car?

Mr. HAMMOND.—We object.

The COURT.—He may answer whether there was anything or not.

A. I didn't see anything.

Q. You could see the automobile right out the window? A. Yes.

Q. You didn't see anything that was obstructing his vision? A. Nothing at all.

(Testimony of J. Boehn.)

Q. About how far—where do you think you saw the automobile? A. At least 150 to 200 feet.

Q. Now, what was your calling in the past, Mr. Boehn, what has been your calling during your early life? A. My business?

Q. Yes. [184]

A. The last seven years it has been the butter business.

Q. But before that?

A. I have railroaded, and carpenter work.

Q. Have you ever operated an engine?

A. Yes, sir, I used to run an engine.

Q. That gave you a pretty good chance to determine speed, did it not? A. Yes.

Q. What could you say about whether or not the motorman was ringing his gong?

A. He was ringing his gong. I took particular notice of that just before we got there. He was ringing it right along.

Q. Where is your daughter?

A. She is in the hospital.

Q. She was subpoenaed, but is in the hospital?

A. Yes. I have a certificate from the doctor that she could not appear.

Mr. FALKNOR.—That is all.

Cross-examination.

Q. (By Mr. BEVINGTON.) Did you notice whether there was a delivery wagon in front of that apartment house? A. I didn't see none.

Q. You don't know whether there was or not?

A. There was a dump-wagon right ahead of us, a

(Testimony of J. Boehn.)

street-wagon, I guess. That was off of 27th, it was above 27th.

Q. Those seats in that street-car, No. 561, that collided with this automobile, are long seats?

A. I was sitting on the long seat toward the front end. [185]

Q. There are no short seats there?

A. I couldn't say. Not in the front end. It is a long seat.

Q. Isn't it a fact, Mr. Boehn, that that street-car has just two seats in it, one on either side, and they are both just long seats; there are no cross-seats in the street-car?

A. I couldn't swear to that. I know I was sitting on a side seat. That I know.

Q. How far back from the corner of 27th Avenue, the intersection of 27th Avenue and Cherry Street were you when you first saw the automobile coming?

A. I got just kind of on an angle with that apartment house. I believe that is what it is.

Q. Do you know how far back you were, how far were you west of 27th?

A. Can I come down there?

Q. Yes. (Witness steps down to map.) Here is the intersection of 27th and Cherry; here is the apartment house. How far back of this intersection were you?

A. The street-car was in the middle of the road. I was on an angle like this (indicating) and could look over here. He was following—oh, I couldn't say probably four or six feet from this curb here.

Q. At any rate the distance—

(Testimony of J. Boehn.)

A. A distance of 150 feet or more.

Q. The distance between where you were and the automobile was from 150 to 200 feet?

A. It was 150 feet from this street, from the line of this street curb.

Q. Mr. Boehn, in riding upon a street-car running along quite [186] rapidly, as this one was, in an easterly direction, and an automobile coming from the other direction, wouldn't it appear to the casual observer that the object coming towards you was coming faster than it really was? To illustrate, you are going by poles, the poles seem to be moving, especially if you are going by—you are riding and another object is moving by you, it appears to be coming towards you much faster than if you could get a side view of it? You have noticed that?

Mr. FALKNOR.—I object to that. I don't believe it is true.

The COURT.—Let him answer.

(Exception noted for defendant.)

Q. You have observed that in common observation?

A. If you are riding square in front it might, but I was not square in front when I first saw it. I had a side glance, you might say a quarter.

Q. You say that you saw the automobile down there and you turned around?

A. Turned my head.

Q. Turned your head so that you now say to the jury, as you did on direct examination, that you

(Testimony of J. Boehn.)

think you saw the automobile before the motorman did?

A. Well, I thought I did, because as I turned—I saw it coming, and no more than seen it than I turned my head like this (illustrating) and at that time he was slapping on his brakes.

Q. You think you saw it then—

A. I think I saw it as quick as he did, anyway. Of course that is a matter of opinion of mine.

(Witness excused.) [187]

[Testimony of L. J. Ellis, for Defendant.]

L. J. ELLIS, produced as a witness on behalf of defendant, being first duly sworn, testifies as follows:

Q. (By Mr. FALKNOR.) What is your name?

A. L. J. Ellis.

Q. You were a passenger on this car?

A. Yes, sir.

Q. You are here under subpoena? A. Yes, sir.

Q. Where in the car were you riding, Mr. Ellis?

A. I was riding with the conductor.

Q. Back at the rear end?

A. Yes, sir. I didn't happen to be in the car.

Q. Now, you were there, Mr. Ellis, you tell the jury how you saw this accident?

A. Well, as we were approaching about 27th Avenue I was looking for my number—I was a stranger out there and was afraid I would pass, and so I was looking for my number. That made me observe this car that was coming down 27th. As I saw the car coming down—

Q. Do you mean the car or the auto?

(Testimony of L. J. Ellis.)

A. I mean the automobile. They were in that position when I saw them.

Q. About how far was the automobile away from Cherry Street when you saw it?

A. Well, the nearest I could bring it to the crossing would be thirty feet.

Q. It was down about thirty feet on 27th Avenue when you saw it? A. Yes.

Q. Now, was there anything to prevent the driver from seeing [188] the street-car at that time?

A. Nothing that I saw.

Q. You could see it plainly? A. Yes.

Q. There was nothing between you and the automobile? A. No, because I saw it.

Q. About what speed was the automobile coming?

A. That is hard to determine.

Q. As compared with the street-car?

A. Well, from where the street-car was at that time and where the automobile was it was reasonable for me to suppose that the automobile was coming the fastest.

Q. Did the automobile come to a stop?

A. I never saw it stop.

Q. Where did the collision occur, on what portion of the street-car?

A. Well, I never noticed the street-car to see where it hit the street-car at. I just saw them examine the street-car, but I never went and examined it at all.

Q. Did you have any talk with any of them afterwards?

A. You mean with the automobile people?

(Testimony of L. J. Ellis.)

Q. Yes.

A. I spoke to Mr. Hunt. That was the first time I had ever seen him.

Q. What did he tell you?

A. As soon as the street-car stopped I went right back. I wanted to see who was hurt, and I asked Mr. Hunt, which I guess he will tell you today—I said, “Are you hurt much?” And as well as I could tell it, he says, “Not much” or something to that effect, but he referred me to [189] his automobile.

Q. Did you give Mr. Hunt your name at that time?

A. Yes, sir.

Q. And he has been to see you about being a witness in the case? A. Sir?

Q. You gave Mr. Hunt your name at that time?

A. Yes.

Q. And he afterwards came to see you about being a witness?

A. Well, yes, he came to see me, and I don't remember—he wanted to see, I think, what I found out about it. He didn't say anything about subpoenaing me.

Q. He came to see you about the case?

A. Yes, sir.

Mr. FALKNOR.—That is all.

Cross-examination.

Q. (By Mr. BEVINGTON.) He wanted to see you about what you found out, you say?

A. What I had found?

Q. Yes. You say Mr. Hunt came to see you and

(Testimony of L. J. Ellis.)

wanted to see about what you found out, is that what you said?

A. He just—Mr. Hunt came to see me when I lived at Belmont north, 107½. That was shortly after the accident.

Q. I understood you to say he came to see you about what you had found out?

A. Oh no, not what I had found out. After the thing happened, he never said anything about that.

Q. You were on the back platform? [190]

A. Yes, sir, with the conductor.

Q. Talking with the conductor at the time?

A. No, I was not talking with the conductor at the time.

Q. Now, just about where were you standing on the back end of that platform?

A. I was standing back where you get on, and a little to my right, because I remember having hold so I could watch when I wanted to get off.

Q. The doors were closed?

A. Yes, the doors were closed.

Q. Wooden doors?

A. I don't remember anything about the doors.

Q. Aren't they wooden doors?

A. I won't say they was wooden or anything about them.

Q. The windows are pretty high up and narrow?

A. I don't remember, only I had a perfect view. But I was not interested, I never expected to be in any collision or anything about it, and I was just looking to see where my number was.

(Testimony of L. J. Ellis.)

Q. Was the conductor looking forward?

A. I wasn't watching the conductor. I was watching for my place there.

Q. Were you talking to the conductor?

A. No, sir.

Q. How far from the corner were you when you first saw the automobile?

A. Well, that is hard for me to determine. When I first saw it it was only the distance that I have measured up according to an old farmer's measure, by stepping his steps from the place where the accident happened back so far, [191] over, I will say over, but how much over I could not say, thirty feet.

Q. You are a farmer, you say?

A. I am what you might call a retired farmer.

Q. Have you been out there to look the ground over recently? A. Yes, sir.

Q. Stepped it off recently? A. Yes, sir.

Q. How long after the accident was it that you went out and stepped it off?

A. Last Tuesday afternoon.

Q. After you were subpoenaed? A. Yes, sir.

Q. At whose request?

A. My own request. My own wife never knew I went, nobody but myself.

Q. Prior to that had you had any conversation with Mr. Falknor or the attorneys for the street-car company? A. Yes, I had.

Q. Was there any suggestion that you go out and step it off?

A. No sir. The company afterwards sent me a

(Testimony of L. J. Ellis.)

statement to sign up. He says, "Do you remember this?" I said "Yes, but on that is one mistake."

Q. What was that?

A. My daughter—she had been always used to riding on the Summit—I gave her that and said, "You call them off and ask me the questions, and I will answer the questions." So she called off and said, "How fast was the car going?" I said about twelve miles. She said "I put it down between eight and ten." I told him, I says, "I will [192] correct that, the car was going over ten miles," and he said that was all when he got through, "That is all for you," and that is all he said. But he never knew that I had any idea of going out there, but when you and Mr. Hunt came to see me and pinned me down so tight in regard to these distances I thought I had better go out and get the best idea I could.

Q. After we pinned you down to distances then you went out and stepped it off?

A. I wanted to be sure. You remember you pressed me, you wanted to put it at one hundred, so I thought I would step that so if the Court asked me I would not say "I suppose." As I told you I may vary a little in the three feet, but I stepped it. Then I stepped from the car track to the apartment house to see how far that was, and then I stepped it from where the thing happened up Cherry Street as near as I could where I saw the automobile, and then I put a little flag there and went back down here to see how far I was down west when I could see the car. But from 27th Avenue across to the apartment house,

(Testimony of L. J. Ellis.)

I didn't step that. I would have done it but I forgot it.

Q. Now, Mr. Ellis, have you had much experience in determining how fast a street-car was going prior to this injury?

A. I will tell you all the experience I have had if you will give me a chance.

Q. Answer the question?

A. Yes sir, I have had experience.

Q. Prior, I mean before the accident, had you had much experience. A. I had some. [193]

Q. Haven't you since repeatedly rode along with street-car conductors and asked them how fast they were going? A. I have.

Q. You have done that on the Renton line?

A. I did that this morning when I was coming in.

Q. You have done that nearly every day?

A. Not every day. I don't come every day. Frequently. I don't always.

Q. How long have you been doing that?

A. I have been doing that ever since about the first of April, 1912.

Q. Ever since the first of April, 1912?

A. Off and on. I don't make it always a practice because the conductors would get tired of it.

Q. You have been doing that since the accident?

A. Before. I was getting speed ideas. I had ridden on some automobiles in Kansas City, and street-cars, and horses in Richmond, Virginia. I had heard so much about different speeds that I very often said, "How fast are you going?"

(Testimony of L. J. Ellis.)

Q. Have you ridden much in automobiles?

A. I rode some in Kansas City, and I rode some in Iowa and Kansas, and some in Seattle.

Q. Very much? A. No, not very much.

Q. Did you ever have any accident in an automobile? A. No, sir.

Q. Did an automobile ever run into your team when you were farming?

A. No, sir, none I was in. [194]

Q. Aren't you a little prejudiced against automobiles?

A. No. I have no prejudice in my heart against an automobile. Sometimes I have been driving and found that the automobiles, while people were damning them,—seeing them trying to dodge people, I thought they was a little hard on the automobiles.

Q. (By Mr. FALKNOR.) About what speed was this street-car going along there at the time?

A. Now, I could explain to you what I am going to tell you. I tell you that I was thinking the street-car was going about twelve miles, and I could explain why I put it at that.

Mr. FALKNOR.—That is all.

(Witness excused.) [195]

[Testimony of Stephen Enos, for Defendant.]

STEPHEN ENOS, produced as a witness on behalf of Defendant, having first duly affirmed, testifies as follows:

Q. (By Mr. FALKNOR.) What is your name?

A. Enos Stephen.

Q. Were you in the vicinity of this accident at the

(Testimony of Stephen Enos.)

time of this accident? A. I was.

Q. What were you doing?

A. I am a street cleaner.

Q. On what street were you working, Mr. Enos?

A. On 27th Avenue.

Q. You were working on 27th Avenue?

A. Going towards Cherry Street.

Q. You were working on 27th Avenue towards Cherry, in the block just south of Cherry?

A. Just about, I guess about 250 feet.

Q. South of Cherry? A. South of Cherry.

Q. Did you see this automobile before the accident? A. I did, sir.

Q. About what speed would you say it was running when it went by you?

Mr. HAMMOND.—If the court please——

Mr. FALKNOR.—Let him tell in his own way.

Mr. HAMMOND.—This witness is not qualified.

(Question repeated to the Court.)

The COURT.—Objection sustained.

Q. Have you ridden in automobiles, Mr. Enos?

A. I have. [196]

Q. And have observed the speedometers?

A. Well, no, I haven't gone that far on that question.

Q. When you have ridden in automobiles did you know about how fast they were running?

A. Well, now, you want to know particularly on this occasion?

Q. No. I want to know if you know, if you at other times and on other occasions, Mr. Enos, ob-

(Testimony of Stephen Enos.)

served the speed of automobiles and street cars and vehicles, and things like that?

A. Well, according to my honest understanding on this case, I want to state, if you will allow me—

The COURT.—What he wants to know is whether you have seen enough operating of automobiles—

A. I have, sir.

The COURT.—(Continuing.) and observed the speed to know how fast they go; when you see one if you have any idea how fast they are going?

A. I would like to tell, but you won't let me.

The COURT.—But do you know?

A. I do know, certainly; if you will allow me to tell you.

Q. (By Mr. FALKNOR.) Now, Mr. Enos—

Mr. HAMMOND.—(Interrupting.) Just a minute. I put in an objection.

The COURT.—Wait, Mr. Hammond. This is already disposed of. There is nothing before the Court. You want to know first whether he knows. (Addressing witness.) I want to know whether you have seen the operation of automobiles and street-cars with relation to speed sufficient to be able to tell this jury. A. Yes. [197]

The COURT.—About how fast an automobile runs, when you see it run?

A. I presume I can if you will allow me to.

The COURT.—I am not asking you how fast this automobile was going, but any automobile. Have you seen them? A. Some goes faster than others.

The COURT.—Are you able to say how fast they

(Testimony of Stephen Enos.)

go when you see them, how many miles an hour?

A. I guess I can. In this case, anyway.

The COURT.—I want to know about some other cases besides this one.

A. I understand I am in this case to testify what I know.

Q. (By Mr. FALKNOR.) I will ask you this; was this automobile going slowly or fast?

A. It was going fast.

Q. Now, Mr. Enos, did you observe the street-car and the automobile after the accident?

A. I heard it strike, and I looked, and I saw they was both standing still, the automobile and the street-car.

Q. Now, about where was the rear end of the street-car?

A. About 27th Avenue, going east on the east side of the curb, on 27th Avenue.

Q. Come down here and show us about where the rear of the street-car was. (Witness steps down to map.) This is 27th Avenue, and this is East Cherry, and this is looking north. About where was the rear end of the street-car?

A. Here is the curb here. Well, the street-car, the rear end of the street-car, was about here. (Indicating.)

Q. About opposite the sidewalk? [198]

A. Yes.

Q. It was standing still?

A. It was standing still.

Q. Did you go up there after the accident?

(Testimony of Stephen Enos.)

A. I did.

Q. Did you have any talk with these men?

A. When I come there there was a few men there, and I asked if anyone was hurt, and the reply was made no.

Q. Were these men present?

Mr. HAMMOND.—We object to this man telling any conversation he had with somebody else unless it was Mr. Hunt, the plaintiff in this case.

The COURT.—Objection sustained.

(Exception noted for defendant.)

Q. Was the automobile there at the time?

A. Yes.

Q. Do you know whether these men were in the vicinity of where this conversation took place, or do you know that?

A. I know there were a few men around the automobile, and I stood there a few minutes, and then I went back where I came from.

Mr. HAMMOND.—We move to have stricken any conversation that he heard there.

Mr. FALKNOR.—I think the presumption would be that they were there.

The COURT.—The Court cannot indulge in presumptions. The motion is granted.

(Exception noted for defendant.)

Q. You didn't see them come together, did you?

A. No. [199]

A. You just heard the impact?

A. I heard a crack, and I looked up and saw both

(Testimony of L. J. Ellis.)

of them standing still, the automobile and the street-car.

Mr. FALKNOR.—That is all.

Cross-examination.

Q. (By Mr HAMMOND.) You have not talked this over with anyone, have you?

A. Talked it over, no.

Q. You haven't talked with anybody about this case, what you were going to testify, have you?

A. Yes.

Q. Who did you talk to?

A. I talked to the gentlemen that stood there at the automobile, and I asked them if anyone was hurt.

Q. Never mind about that conversation. Outside of these two men you haven't talked to anybody?

A. No.

Mr. FALKNOR.—Just a minute; I never put a witness on the stand without asking what he is going to testify to, and neither did counsel yesterday, so I object to the question as impertinent.

Mr. HAMMOND.—That is all.

(Witness excused.)

(Whereupon the Court takes a recess until two o'clock P. M.) [200]

Afternoon Session, Friday, September 25, 1914.
Continuation of proceedings pursuant to adjournment. All parties present as at former hearing.

[Testimony of C. A. Holloway, for Defendant.]

C. A. HOLLOWAY, produced as a witness on behalf of defendant, being first duly sworn, testifies as follows:

Q. (By Mr. FALKNOR.) State your name.

A. C. A. Holloway.

Q. You live in the city? A. Yes, sir.

Q. What is your business? A. Real estate.

Q. You are here under subpoena served on you by the marshall? A. Yes.

Q. Were you on this car? A. Yes, sir.

Q. Where were you riding in the car?

A. About the center, in the center of the car over on the left-hand side.

Q. You were riding on the north side of the car, were you? A. Yes.

Q. Now, I will ask you if you saw the automobile before the collision with the street-car?

A. Yes, sir.

Q. I will ask you if you saw it down on 27th Avenue? A. Yes.

Q. Before it got out into Cherry? A. Yes.

Q. What speed was it coming? [201]

Mr. HAMMOND.—Just a minute; the witness is not qualified.

The COURT.—Objection sustained.

Q. Have you ridden in automobiles? A. Yes.

Q. And observed the speedometers? A. Yes.

Q. And in street-cars? A. Yes.

Q. And can approximate the speed?

Mr. HAMMOND.—That is a matter of opinion.

(Testimony of C. A. Holloway.)

Let him tell what he did.

The COURT.—He can answer.

Q. You observed when you rode in automobiles the speedometer, and how fast the autos were going?

A. Yes.

Q. I will ask you, Mr. Holloway, from this observation, from observing the speedometer of automobiles, and speed at other instances, if you can approximate the speed of that automobile?

A. I think between ten and fifteen miles.

Q. The automobile? A. Yes.

Q. Now, you go ahead and tell what happened?

A. Well, as I say, I was sitting there, and I was thinking about the thing that happened. I was sitting looking at the motorman, and, of course, seeing the apartment house ahead it just occurred to me that there would be a good place for an accident.

Q. Was the gong being sounded on the street-car?

A. I was going to tell you. Just as we came up to the west [202] end of the apartment-house, why the motorman started ringing his bell, one of these rotaries, whatever you call them. So I was looking directly at him, watching him at that time, and I saw him make a move, I suppose to turn off the power. He did something with his hands before ever I saw the automobile, and as he did that, why I looked up, of course, and the automobile was coming.

Q. Was it on 27th Avenue when you first saw it?

A. Yes.

Q. It had not got on Cherry Street? A. No.

(Testimony of C. A. Holloway.)

Q. Was there anything to prevent the driver of the automobile from seeing the street-car?

A. I saw nothing in the street.

Q. There was nothing that obstructed your view?

A. No, I didn't see a thing outside of the automobile.

Mr. FALKNOR.—That is all.

Cross-examination.

Q. (By Mr. HAMMOND.) When you saw the motorman commence to turn that wheel you were at the west end of the apartment-house, were you?

A. When he did that?

Q. Yes.

A. No, sir. No, we were pretty well, as near as I can remember, about thirty, twenty or thirty feet back from the east end of the apartment.

Q. When he first commenced to put off the power?

A. Yes. [203]

Q. Where was Mr. Hunt and the automobile?

A. It looked to me like he was about the same distance.

Q. From the tracks?

A. Yes, sir, from Cherry Street.

Q. Do you mean the same distance from Cherry Street or the same distance from the tracks?

A. Well, he was about the—I tell you it looked to me from where I was sitting like they were both running about the same speed and got at this point about the same time.

Q. What I asked you was, about where was Mr. Hunt when the street-car was thirty feet, about

(Testimony of C. A. Holloway.)

thirty feet west of 27th Avenue?

A. I would judge Mr. Hunt was about the same distance south of Cherry Street.

Q. You mean on 27th? A. On 27th, yes, sir.

Q. Then you think Mr. Hunt was about thirty feet south of the apartment-house when you were thirty feet west of 27th?

A. I think that Mr. Hunt was as near the center of the street where the accident took place as the street-car was, yes, sir.

Q. Then you are getting Mr. Hunt up towards Cherry Street further. I want to locate Mr. Hunt. This street here is from the car track to the curb eighteen feet, I think it is, sixteen feet. Now, do you want Mr. Hunt thirty feet down here? (Indicating.)

A. I told you what I think. The way I could see it, I believe that Mr. Hunt was as far on this street from, we will [204] say this point along about here—

Q. That is not what I asked you.

A. What did you ask me?

Q. I asked you to point to the place where Mr. Hunt was?

A. I could not tell you exactly. I told you that I thought he was between twenty-five and thirty feet from Cherry Street.

Q. Now then, you have him twenty-five or thirty feet down this way from this line here? (Indicating.)

A. That is the idea.

Q. And you were about twenty-five or thirty feet

(Testimony of C. A. Holloway.)

down this way from this line?

A. In the neighborhood of that, yes.

Q. That was the first time you saw him?

A. Yes, that was the first time I saw him.

Q. Where was the conductor or motorman? The motorman was fifteen feet ahead of you.

A. Don't understand me that way. I was sitting—I meant from the front end of the street-car.

Q. How do you know where the front end of the street-car was?

A. I am giving it to you just as I saw it. I didn't measure the distances.

Q. The motorman was fifteen or twenty feet ahead of you? A. Yes.

Q. When you saw the automobile it was about twenty-five feet from this line here, you said? (Indicating.) A. Well, yes.

Q. Now then, the motorman would be fifteen feet ahead of you, wouldn't he?

A. I did not refer to the drivers of either. I had reference [205] to both the street-car and the automobile.

Q. But the motorman was fifteen or twenty feet ahead of you, wasn't he? A. Yes.

Q. That would take him up here so that he could see the automobile further down than you could, if he had been looking.

A. Sure, he could see it quicker than I did.

Q. You saw it twenty-five feet from Cherry Street—when you and the street-car were about twenty-five feet from 27th Avenue, that is right, isn't it; you

(Testimony of C. A. Holloway.)

saw the automobile twenty-five feet from Cherry Street? A. Yes.

Q. At the same time the street-car was about twenty-five feet from 27th Avenue?

A. The front end of the street-car, I judge about that distance.

Q. Then the motorman could have seen him seventy-five or one hundred feet down here?

A. Why, I don't know.

Q. Where was the motorman when he commenced to turn off his power?

A. Well, sir, I couldn't tell you.

Q. Where were you? A. In the car.

Q. Whereabouts?

A. Let's see; this is the street-car, this desk (referring to jury-box rail); I was sitting about in this position here. (Indicating.)

Q. About half way, a little further this way than the other? [206]

A. I was sitting pretty well the center, as well as I remember. I was looking directly at the motorman, and as we came along, just as we came up to this apartment-house, he started ringing the bell. I was sitting there watching him and saw him. I was still looking at him and I saw him make a move of some kind.

Q. Where were you? A. I was sitting there.

Q. I mean where was the street-car with reference to the apartment-house.

A. I tell you the street-car was practically twenty-five or thirty feet from Cherry Street.

(Testimony of C. A. Holloway.)

Q. When he commenced to stop?

A. From this line here. (Indicating.)

Q. When he commenced to stop?

A. When he threw—

Q. (Interrupting.) He didn't commence to do it before that? A. Well, that is the way I saw it.

Q. Now, you say that while you were sitting there you were thinking about this very same thing that might happen?

A. It is peculiar, but I was, yes, sir.

Q. Was that caused by the rapidity with which the car was going? A. No.

Q. And the dangerous point there?

A. No. I will tell you; when I am in a street-car, or in an automobile, I should have said, and we are approaching a street-car line or even any other street, why I am always kind of looking out for these things.

Q. You figured that was a dangerous place? [207]

A. Not necessarily, only I figured that an apartment house like that was would be a good place for an accident.

Q. They are dangerous places?

A. Yes, in a way that is a fact.

Q. It would be just as hard for the motorman to see the approaching automobile as it was for the driver of the automobile to see the approaching street-car; in fact, would it not be harder for the automobile man who sits nine feet back of the front end of his car, wouldn't it be harder for him to see a street-car than for the motorman to see him?

(Testimony of C. A. Holloway.)

Mr. FALKNOR.—I object to that as a matter of argument.

The COURT.—Let him answer. The jury knows as much about that as he does.

(Exception noted for defendant.)

A. Really, I don't know.

Q. You say you don't know?

A. No, because I never drove a street-car or an automobile.

Q. You were sitting on the left-hand side of the car? A. Yes.

Q. How wide was the car? A. I don't know.

Q. Well, you can guess at it; you know about how wide that car was; how far were you from the other side of the car, the south side of the car?

A. If you will tell me how wide the car is I will tell you. I will have to guess at it. It might be four feet, or six, or eight, I really don't know.

Q. You know it is not eight feet, don't you, you are able to judge the distance. [208]

A. Well, possibly six feet across, from the outside to the outside.

Q. When you are sitting in that street car you are about on the level with the other side of the car, are you not? A. Yes.

Q. So that you have to look over this—the east side of the car, the south side of the street-car, and on beyond that to get a look at the automobile?

A. Had to do what?

Q. Had to look over the south side of the street-car? A. No, I was looking directly in front.

(Testimony of C. A. Holloway.)

Q. (By Mr. FALKNOR.) The motorman began to ring his gong when he was at the west side of this apartment house?

A. He commenced ringing his bell when we came up opposite the apartment house.

Q. One of these rotaries? A. Yes, sir.

Q. Repeaters? A. Yes.

Mr. FALKNOR.—That is all.

(Witness excused.) [209]

[Testimony of Everett Browning, for Defendant.]

EVERETT BROWNING, produced as a witness on behalf of defendant, being first duly sworn, testifies as follows:

Q. (By Mr. FALKNOR.) State your name?

A. Everett Browning.

Q. You were the conductor on this car?

A. Yes.

Q. You were in charge of the car? A. Yes.

Q. Tell the jury what you know about this accident? A. As we were approaching 27th—

Q. What about 26th, did you make a stop there?

A. Yes, we made a stop at 26th.

Q. On the west side?

A. Yes, sir, on the west side of 26th. As we were approaching 27th, I should judge at the rate of fifteen—I put the speed a little higher than some of the others—fifteen or more—not very much more, however—I believe in the report we made we put it fifteen, and I claimed perhaps it might be a little over fifteen, but not very much over fifteen—as we approached 27th my first intimation of anything wrong

(Testimony of Everett Browning.)

was the sudden slowing up of the car, and I got to the side door, the best place I could see, back far enough—I could see through the windows some—I got over to the side where I could see better. I was, of course, not the same place as one old gentleman here—I was in the conductor's place next to the body of the car. There is a division between the entrance and the exit, and I was closer to the exit than to the entrance. They come in the back part, and I [210] was closer to the front part. I looked out the rear window—these cars are open, the vestibule and the body of the car are almost the same thing, they are practically the same thing. They have doors on them with closed panels. I looked through the rear window, and when I first saw the automobile on 27th it was—well, it had started into Cherry Street. It was then almost to the car. I didn't see the automobile until we had come—well, it was two or three seconds before the collision that I saw it. In regard to where it struck the car I could not, of course, from where I was seeing the contact, could not see the point of contact, but on examination of the car the first scratches I saw on the car anywhere were on the last half of the door, the half of the door toward the body of the car, back of the bumper and fender. And in regard to—

Q. Just a minute. You had car No. 361?

A. Yes, sir.

Q. Is that a picture of the car taken the next day, or the same day? (Hands photograph to witness.)

A. Yes, sir.

(Testimony of Everett Browning.)

Mr. HAMMOND.—We object to the witness testifying when it was taken unless he knows.

Mr. FALKNOR.—Well, I asked him.

The COURT.—Proceed.

Q. Does that show the scars on the car?

A. There was a scratch on this door somewhere, I think back in here somewhere. (Indicating.)

Mr. FALKNOR.—I offer this in evidence, Your Honor.

The COURT.—Admitted. [211]

(Photograph received in evidence and marked “Defendant’s Exhibit A.”)

A. (Continuing.) Here is the scratch right in here, and then going back—the last half of the front door—going back to this box here, the covering was knocked off here. I believe this casting was knocked off. I knew the two rear castings were knocked off, and it must have sprung a little away from the car then, I don’t know to what extent. It is scratched clear back to here, knocking the casting off on the rear wheel.

Q. Where was the first mark on the side of the car?

A. The last half of this door. (Indicating.)

Q. There were no marks near the front end of the car?

A. I didn’t see any, and I examined the car. There was nothing to indicate it had touched the car beyond that part.

Q. Now, how about the ringing of the gong along there, did you notice that?

A. I did not. That is one thing that I did not

(Testimony of Everett Browning.)

notice at all. I know they usually ring the gong, but I couldn't swear. I want to tell just what I know, and I couldn't swear whether or not the gong was touched at all. I have no recollection of that.

Q. Did you have a talk with these people afterwards, Mr. Browning?

A. I did, but I can't recall the conversation, and would not want to attempt to say what it was.

Q. Did you ask them if they were injured—I will ask you that, did you make any inquiry as to whether they were injured?

A. I could not positively say what I said, but I must have [212] made an inquiry, because that is one of the first things that a conductor is supposed to do in case of an accident.

Q. When you made out your report you said nothing about any injuries to the parties?

A. I did not.

Mr. HAMMOND.—We object to that.

Mr. FALKNOR.—I want to show that he evidently must have done that.

Mr. HAMMOND.—It has been over a year since it happened. We move that it be stricken, this evidence as to what the report was that he made to the company.

The COURT.—Yes; whatever report was made, that will be stricken, and the jury is instructed to disregard that testimony.

Mr. FALKNOR.—It was not made. That is all.

Mr. HAMMOND.—That is all.

(Witness excused.) [213]

[Testimony of Robert Atkinson for Defendant.]

ROBERT ATKINSON, produced as a witness on behalf of defendant, being first duly sworn, testifies as follows:

Q. (By Mr. FALKNOR.) State your name?

A. Robert Atkinson.

Q. Mr. Atkinson, what was your business last year? A. Automobile business.

Q. What car were you selling?

A. The Hudson.

Q. You had the agency of the Hudson car?

A. I was manager of the agency, yes, sir.

Q. I will ask you if your branch agency made the contract with Mr. Hunt? A. Yes, sir.

Q. Mr. Atkinson, do you remember the instance of this car, the one you had sold to him under contract, becoming involved in a street-car collision out at 27th and Cherry? A. Yes, sir.

Q. I will ask you if after the accident you went out to get the car? A. Yes, sir.

Q. And if you helped to bring it in? A. Yes.

Q. I will ask you if you looked on the street and observed whether the car had done any skidding?

A. I went over to see where the car had turned into Cherry Street.

Q. Tell the jury what you observed as to skidding?

A. I would not call it skidding. Skidding in the automobile sense of the word is sliding sideways. [214] The marks on the pavement that I saw looked as though the wheel, or wheels, had been locked with the brake and had slid, discoloring the pave-

(Testimony of Robert Atkinson.)

ment, making a dark mark.

Q. About how far had the wheels been locked and slid? A. Twelve to fifteen feet.

Q. You were familiar with this car, of course?

A. Yes, with this make of car. Not that particular car, but that make of car.

Q. You sold the car? A. Yes.

Q. I will ask you, in your opinion, about how fast that car must have been going to have had its wheels locked and slid that distance at the time?

Mr. BEVINGTON.—We object to that question in the form in which it is put, not stating the facts. It is assumed that it was skidding and the witness said it was not.

The COURT.—He may answer.

A. I would say the car was going in the neighborhood of twenty-five miles an hour to have made the mark on the pavement that was made. That would be my judgment.

Q. Now, how quickly could this car be stopped going at the rate of eight miles per hour?

A. Four or five feet if the brakes were working properly.

Q. Now, you saw Mr. Hunt, of course, during the negotiations for the sale of this car?

A. Yes, sir. I didn't sell him the car, but one of my salesmen did sell it to him, and of course I was brought into consultation.

Q. And you had seen him after he bought the car and was driving it? [215] A. Yes.

Q. And you have seen him since, and see him to-

(Testimony of Robert Atkinson.)

day? A. Yes, a few times.

Q. How does his appearance today compare with what it was when you first saw him, Mr. Atkinson?

A. Do you mean his facial expression?

Q. Yes.

A. In general appearance there is very little chance, to my notion. Of course not being intimate with him or seeing him frequently, perhaps my judgment would not be as good as others' who had seen him more often, but looking at him sitting over there today and sitting in my office at different times I would say he was very much of the same general appearance.

Q. After this accident you took the car into your place of business? A. Yes, sir.

Q. You people made the repairs, did you?

A. Yes.

Q. You people paid for them? A. Yes.

Q. Did he ever get the car after that?

A. No, sir.

Q. You had possession of the car at all times afterwards? A. Yes.

Q. And sold it to somebody else? A. Yes.

Cross-examination.

Q. (By Mr. BEVINGTON.) Mr. Atkinson, you were phoned to and [216] came out after the automobile? A. Yes.

Q. You say that you were the manager of the Pacific Car Company at the time the machine was sold to Mr. Hunt? A. Yes, sir.

Q. You wrote him some letters regarding the ex-

(Testimony of Robert Atkinson.)

tension of time for making payments, did you not?

A. I don't recall all the circumstances, but I think I do remember that he asked for an extension of time.

Q. You wrote him regarding an extension of time, didn't you?

A. I don't remember. Those transactions, of course, are—you don't carry them around in your mind. A great many of those kind of transactions will be in one's mind in the course of a year.

Q. You took the car back to the company's garage?

A. Yes, sir.

Q. At his request, for repairs? A. Yes sir.

Q. And charged, and you sent the bill for the repairs to him, didn't you? A. Yes, sir.

Q. And continued to send the bills until about April 5th, following when you wrote him sending him the cancelled note?

A. Yes. The cancellation of the note, and the sending of the note was not done by me, but by the Pacific Car Company.

Q. But you continued sending him bills and seeing him in reference to the payment of the charges against the car up until April 5 following, when the notes were cancelled?

A. I won't say I saw him continuously up to that time. I [217] don't recollect seeing Mr. Hunt or having any talk with him about the payment of that bill much after the first of the year. We moved into a new place on the first of the year, and I think Mr. Hunt called once, and that was possibly in the month of January or February, and the car was still in our

(Testimony of Robert Atkinson.)

possession at that time.

Q. But it was in your possession, Mr. Atkinson, for the purpose of repairs at his request? You had not forfeited the contract?

A. Yes, he had forfeited the contract.

Q. I say you had not forfeited the contract?

A. Oh, to him?

Q. Yes. A. No, we had not returned it.

Q. And it was your hope—you wrote him and talked with him? A. Yes.

Q. In the hope that he would be able to pay the repair bill and the next payment that was due?

A. Yes.

Q. And you gave him up until the car was finally sold, a few days before it was sold, to pay that repair bill and make his next payment under his contract?

A. I wrote him about it. I was doing it for his good as well as our own.

Q. You wrote him—I will hand you a letter here and ask you—August 4, 1913—and ask you if that is not your signature over the word “manager”?

A. Yes, sir, that is my signature.

Q. You sent that to Mr. Hunt, didn't you?

A. Yes. [218].

Q. In regard to the extension of payments?

A. I said we would give him—

Q. You sent that to him? A. Yes.

Mr. BEVINGTON.—I will have it marked Exhibit No. 5 for identification.

(Document marked “Plaintiffs’ Exhibit No. 5 for identification.”)

(Testimony of Robert Atkinson.)

Mr. BEVINGTON.—We offer it in evidence.

Mr. FALKNOR.—I object as incompetent and immaterial, a collateral matter, wholly immaterial.

The COURT.—Overruled. Admitted. Exception.

(Exception noted for defendant.)

(Document received in evidence and marked “Plaintiffs’ Exhibit No. 5.”)

(Whereupon Mr. Bevington reads Exhibit No. 5 to the jury.)

Q. Now, Mr. Atkinson, after writing that letter—you say that the car was taken back at Mr. Hunt’s request, to be repaired for Mr. and Mrs. Hunt, wasn’t it? A. Yes, sir.

Q. And on October 17, did you send him the two bills—I will have them marked Exhibits Nos. 6 and 7.

(Documents marked “Plaintiff’s Exhibits Nos. 6 and 7 for identification.”)

A. This is the work of the book-keeper.

Q. That is, No. 6 is the work of the book-keeper?

A. Yes.

Q. It was sent from the Pacific Car Company?

A. Yes. Yes. [219]

Q. No. 7, whose work is that?

A. That is the handwriting of the bookkeeper.

Q. You know the handwriting? A. Yes.

Q. That was sent to him? A. Yes, sir.

Q. October 17, both of them. The one, Exhibit No. 6, includes items that you had actually put on the machine, does it not, that is, the Pacific Car Company put on; and the other includes, No. 7 includes two

(Testimony of Robert Atkinson.)

tires, making the total bill—

A. (Interrupting.) Wait a minute here; those amounts, those latter amounts are not in his handwriting, these two tires and two rims and one cover.

Q. The two tires were damaged?

A. Yes, I presume they were. I don't remember distinctly about them.

Q. What is the value of the tires?

A. They are worth about, oh, I should judge—with inner tube you mean, the whole thing?

Q. Yes.

A. About \$45 apiece.

Q. As indicated on that bill? A. Yes.

Q. So that the total repairs to that car was as shown by the aggregate of these two bills—

A. \$529.73. No, that is not exactly the case, Mr. Bevington.

Q. What is to be taken away from the \$529, that is all we had.

A. Well, the amount due October 1st of \$72.63, as I recollect it now, was a bill, an invoice that we made prior to the [220] time of this accident.

Q. Tell the jury what were the proper charges for repairs on that car on account of these injuries?

A. The \$529.73 with the \$72.63 deducted would be about the amount, about \$457.

Mr. BEVINGTON.—I will have this letter marked Exhibit 8 and this one Exhibit 9. We will offer in evidence Exhibits Nos. 6 and 7.

(Documents marked "Plaintiffs' Exhibits Nos. 8 and 9 for identification.)

(Testimony of Robert Atkinson.)

Mr. FALKNOR.—I object to them as immaterial.

The COURT.—The object to that one is sustained, that one on which items appear that do not belong there.

Mr. BEVINGTON.—He made the deduction.

The COURT.—The jury will have the testimony. The objection to that is sustained, Exhibit No. 7.

Mr. BEVINGTON.—Note an exception.

(Plaintiffs' Exhibit No. 6 for identification received in evidence and marked "Plaintiffs' Exhibit No. 6.")

Q. Is the letter, Exhibit No. 8, one that you wrote, is that your signature there? A. Yes, sir.

Q. That was with reference to this same car?

A. Yes.

Q. That was written November 20?

A. Yes, sir.

Mr. BEVINGTON.—We offer Exhibit No. 8 in evidence.

Mr. FALKNOR.—Objected to as immaterial.

The COURT.—It will be admitted.

(Plaintiffs' Exhibit No. 8 for identification received in evidence and marked "Plaintiffs' Exhibit No. 8.") [221]

(Exception noted for defendant.)

(Whereupon Mr. Bevington reads Exhibit No. 8 to the jury.)

Q. Now, did Mr. Hunt see you after you wrote that letter? A. Yes, sir.

Q. And you had further oral negotiations with him

(Testimony of Robert Atkinson.)

in reference to further time to make that payment for repairs?

A. Yes, he said that he would try and raise \$700, as I remember it.

Q. You still did not forfeit the contract?

A. No, but I told him I would do what I could to extend the time for him if he could raise some money.

Q. Now, Exhibit No. 9 is another letter in your handwriting, isn't it, with reference to the same matter? A. Yes, sir.

Mr. BEVINGTON.—We offer it in evidence.

Mr. FALKNOR.—I object to it as irrelevant and immaterial.

The COURT.—It will be admitted.

(Plaintiffs' Exhibit No. 9 for identification received in evidence and marked "Plaintiffs' Exhibit No. 9.")

(Whereupon Mr. Bevington reads Exhibit No. 9 to the jury.)

(Exception noted for defendant.)

Q. Now, that was the letter and the instrument by which the contract, Plaintiff's Exhibit No. 3, was cancelled, was it not?

A. Prior to that letter is the conversation that I spoke about a few minutes ago. As I recall it Mr. Hunt came into our place of business and I talked the matter over with him. He said that certain arrangements that he [222] had been trying to make to raise this money had fallen down, and that he was afraid he was not going to be able to raise the money, and I then said, "Mr. Hunt, you can see very readily

(Testimony of Robert Atkinson.)

our position in this matter. We can not string this along indefinitely this way, and if you are in a position where you can not go any further we have got to take some action." He said, "Yes, that is true." We talked the matter over *pro* and *con*, and this letter, I think, was the result of that conversation. This was the duplicate original contract. (Referring to Plaintiffs' Exhibit No. 3.)

Q. Mr. Atkinson, this bill to repairs was never charged to anybody else, was it, than to Mr. and Mrs. Hunt?

A. No, unless it was charged to an account that we carry offsetting kind of expenses like this to some other account in our books. For instance, it would be charged to "Hudson maintenance."

Q. It never has been paid?

A. No, sir, not directly. It was paid indirectly, of course, in the sale of the car.

Q. What I mean is, that bill still stands as a charge against the Hunts?

A. No, we charged all those accounts off. We charge those off after a certain length of time, and clean the books that way.

Q. Under this contract, Exhibit No. 3, and your arrangements with him, made from time to time, orally and by letter, the Hunts had the use of the car up until the time the contract was forfeited and the car sold to Mr. Wood?

Mr. FALKNOR.—Just a minute; the contract speaks for itself. [223]

The COURT.—He may answer.

(Testimony of Robert Atkinson.)

(Exception noted for defendant.)

A. I didn't get the question exactly, Mr. Bevington.

Q. Under the terms of this contract, Plaintiff's Exhibit No. 3, and the arrangements in connection with the contract that you had with Mr. Hunt by letter and orally, Mr. and Mrs. Hunt had the use of that car up until the time of the forfeiture?

A. Which was the time of the accident, you mean?

Q. No, up until the time of the forfeiture. They had the use of that car if they could pay the bill and had paid it, it was their's to use under the terms of the contract?

A. If they had paid their sundry account we arranged to let them have the car, but of course the non-payment of that sundry account stopped the whole proceedings.

Q. You could have forfeited it, but didn't?

A. Yes.

Q. Did you hold the car there for a time then under your lien for repairs?

A. We didn't lien it, no, sir.

Q. Then they were entitled to that car up until the time you actually forfeited the contract?

A. They were entitled to it if they had come in and paid their sundry account. They were also entitled under the arrangement if they would pay us \$300 on their sundry account and \$400 on the note account we would give it up.

Q. Their sundry account included the damages?

A. Yes, sure.

(Testimony of Robert Atkinson.)

Q. (By Mr. FALKNOR). They didn't pay the account and you have held the car all the time?
[224] A. Yes.

The COURT.—I would like to ask this witness one question about the sundry account, whether that included anything else than the car repairs?

A. Yes, sir, it included an item of \$72 for sundries that were purchased by Mr. Hunt prior to the time that the accident occurred, as the statement will show.

Q. (By Mr. FALKNOR.) Do I understand that after you sold the car you no longer charged any account to the Hunts, repairs or anything else?

A. No. No.

Q. And the Pacific Car Company now has no bill against the Hunts? A. No.

Q. And the Pacific Car Company paid for these repairs?

A. They paid for these repairs and charged them off in the maintenance account when the car was sold.

Q. (By Mr. BEVINGTON.) In view of the Court's question; this exhibit No. 7, the total of \$529.-73, the \$72.63 that you marked here in pencil, deducting that, leaving the balance of \$457.10, is the amount of the sundry account that you say should be deducted and is not included in the items of repair for damage to the car?

A. Now, Mr. Bevington, you remember that I made the statement that there were some items here of tires, two rims and a cover, that were not entered by the bookkeeper, or by anyone, so far as I know, in

(Testimony of Robert Atkinson.)

the employ of the Pacific Car Company. They seem to have been put in there, added to the original statement that we sent to Mr. Hunt, a total of \$121.96, making the grand total of \$529.73. [225] Now, so far as the Pacific Car Company is concerned we only had \$397.83 against him. Where he bought these tires or anything about that, or how he got these figures, I don't know. These were never charged to him by us because they were never purchased by us.

Q. Then the Court is right about excluding this. They would amount to about how much apiece?

A. I will tell you. Assuming that his figures are correct; I haven't looked it up, and the prices of tires change, but I believe that his prices are about right on the tires. I know they are right on the rims because the rims are \$4.50, apiece and he has \$9.00 charged for rims; and one cover, \$4.50, is right also. As to the tires it is approximately right if they had been purchased at that time.

Q. If the tires and the rim and the cover were included in the damage items then the total of \$457.10 would be approximately right? A. Yes.

Mr. BEVINGTON.—We will reoffer Exhibit No 7 for identification with the explanation.

Mr. FALKNOR.—I object as immaterial.

The COURT.—Objection sustained.

(Witness excused.) [226]

[Testimony of Charles Lidston, for Defendants.]

CHARLES LIDSTON, produced as a witness on behalf of defendant, being first duly sworn, testifies as follows:

Q. (By Mr. FALKNOR.) State your name?

A. Charles Lidston.

Q. You are one of the investigators of the company? A. Yes, sir.

Q. I will ask you if you examined the car involved in this controversy? A. I did.

Q. When did you examine it, Mr. Lidston?

A. The day following the accident.

Q. Where was the car when you examined it?

A. Do you mean the street-car or the automobile?

Q. I mean the street-car, not the automobile.

A. It was at the Jefferson Street barn.

Q. Had any changes been made on the car between the time of the accident and the time you saw it?

A. No, sir.

Q. What damage, if any, had been done to the street-car?

A. The principal damage to the street-car was the scaling of the paint along the side of the car, and the knocking off of journal box covers. There was very little damage, that is, to put the car in commission.

Q. Could you see where the impact had first occurred on the car? A. I certainly could.

Q. Take this exhibit and show the jury where the impact first occurred between the car and the automobile. (Handing witness Defendant's Exhibit "A.")

(Testimony of Charles Lidston.)

Mr. HAMMOND.—That is, as shown in the picture.

Q. And as it appeared at the time you examined the car.

A. This is a photograph of Car No. 361 taken the day following the accident. The marks shown on the car began at this door, close between the two doors. There are two doors. This appears to be a door, but it is not a door that moves. This is the door that operates. This is the front end of the car, where the motorman is. The marks on this car began here. (Indicating.) They were very fresh and easy to observe. They began right at the center, between the fixed panel and the door which opens, and you can easily trace them back on the picture, and the journal box down here in the middle wheel of the truck, and also took the rear one on the rear end. This shows it on the picture.

Q. Were there any marks on the front of the car, in front of where the impact had first occurred on the door; were there any marks near the front of the car beyond the marks where you first mentioned?

A. There were no distinct, fresh marks showing further in front of the car than right here. (Indicating.)

Cross-examination.

Q. (By Mr. HAMMOND.) Mr. Lidston, were you present when this picture was taken?

A. Yes, sir.

Q. Had you seen the car in the meantime?

A. No, sir.

Q. You didn't see this car from the day of the ac-

(Testimony of Charles Lidston.)

cident until [228] the next day?

A. No. I told the dispatcher not to have anything done with the car.

Q. I don't care what you told somebody else, but whether or not you saw the car during that time?

A. I answer the question "no."

Q. Now, you say the first marks that you saw were on the front door here, or this stationary part?

A. Between the panel and the door, back of the front door.

Q. Just point to that again for me, will you, please, the exact point where you first saw it?

A. Right there. (Indicating.)

Q. If this point here had struck the rubber wheels of the automobile it probably would not show?

A. It would not scratch the paint, I don't think.

Q. What is the distance from this point indicated as the stationary door, the rear of that stationary panel to where the motorman stands in front?

A. He stands practically opposite this door.

Q. What is that distance?

A. The distance from here? (Indicating.)

Q. No, from here, the rear of that panel, to where the motorman stands?

A. The mark begins here.

Q. I am not speaking of the mark, what is that distance? A. Four feet.

Q. What is the distance from there to the middle of the car, from the rear side of that panel to the middle of the car?

A. From the rear of this door to here? (Indicating.)

(Testimony of Charles Lidston.)

Q. Yes. [229]

A. Practically fourteen feet.

Q. Then it would be practically fourteen plus four, eighteen feet from the middle of the car to where the motorman stands? A. Yes.

Q. It is the same distance from what you might call the lobby or rear of the car, the vestibule?

A. Practically the same.

Q. The only mark you observed was in this platform, beginning there? (Indicating.)

A. Beginning there and continuing back, as you can see.

Q. What is the width of this door? A. Two feet.

Q. And about how high is this first scratch on the door, just back of the door, from the rail?

A. It is about twenty-two inches.

Q. It is down below the top of the car wheel, isn't it? A. Yes.

Q. It is two feet, practically, to this iron band here? A. Yes.

Q. That iron band stands out about two inches from the car? A. It stands out a great deal more.

Q. How much further out?

A. All of six inches.

Q. It stands out six inches beyond the car, this iron band here? A. Yes.

(Witness excused.) [230]

[Testimony of Robert Atkinson, for Defendant (Recalled).]

ROBERT ATKINSON, recalled as a witness on behalf of defendant, testifies as follows:

Q. (By Mr. FALKNOR.) Who steered the car in

(Testimony of Robert Atkinson.)

that day from the accident; took the wheel as the automobile was brought in to the car company's shops? A. Mr. Hunt.

Q. (By Mr. BEVINGTON.) You pulled the car in with a tow car?

A. Yes. I drove a truck out there to get the car, and towed the Hudson automobile in.

Q. And Hunt sat in his own car?

A. You remember you and Mr. Hunt sat in the Hudson car.

Q. I went down with you.

A. No, it was the mechanic; I beg your pardon.

(Witness excused.)

Mr. FALKNOR.—At this time I wish to offer in evidence certified copies of certain portions of city ordinance—I offer in evidence a certified copy of subdivisions 19 and 22 of Section 2 of Ordinance No. 24597.

Mr. HAMMOND.—It is not pleaded, or set up in the pleadings at all, or raised in any way by the defendant in this case.

Mr. BEVINGTON.—It is incompetent, irrelevant and immaterial for that reason.

Mr. FALKNOR.—It is not necessary under the pleadings. I pleaded contributory negligence.

The COURT.—What is the ordinance?

Mr. FALKNOR.—The ordinance bears upon the question of care [231] and right of way and speed under which automobiles can be operated. I pleaded contributory negligence in general terms. They

(Testimony of Robert Atkinson.)

didn't ask me to specify in what way they were negligent.

(Argument by counsel.)

The COURT.—Objection overruled. In this state the burden of proof is upon the defendant to show the contributory negligence. In some states the burden of proof is upon the plaintiff to show he was not negligent. In this state the burden of proof is reversed. Under the allegations in the reply I think this is admissible.

Mr. HAMMOND.—You will allow us an exception.

The COURT.—Oh, yes.

(Certified copy of portions of ordinance admitted in evidence and marked "Defendant's Exhibit B.")

Mr. FALKNOR.—I now offer a certified copy of a portion of Section 2 of Ordinance No. 24597.

The COURT.—What is that?

Mr. FALKNOR.—It bears upon the manner in which they shall turn from one street into another.

Mr. HAMMOND.—We have one more objection to this. There is nothing in this as I see now to show that this ordinance was in force on the 23d day of September, 1913. They revise these ordinances every thirty days, practically, and there is nothing in the ordinance to show that it was in force upon the 23d day of September, 1913.

The COURT.—Objection overruled.

(Exception noted for plaintiffs.)

(Certified copy of portion of ordinance received in evidence and marked "Defendant's Exhibit C.") [232]

Mr. FALKNOR.—I offer a certified copy of Ordinance No. 32263, which pertains particularly to the speed of automobiles. Of course you concede that Cherry Street and 27th Avenue at the time and place of the accident were both paved?

Mr. HAMMOND.—Oh, yes, 27th Avenue and Cherry Street were both paved.

(Certified copy of ordinance received in evidence and marked “Defendant’s Exhibit D.”)

Mr. FALKNOR.—The defendant rests, your Honor.

Here the defendant rests. [233]

[Testimony of M. A. Hunt, for Plaintiffs (Recalled in Rebuttal).]

M. A. HUNT, recalled as a witness on behalf of plaintiffs in rebuttal, testifies as follows:

Q. (By Mr. BEVINGTON.) You heard the testimony of the motorman, Mr. Graff? A. Yes, sir.

Q. You may state to the jury whether after this accident occurred the motorman came back and this conversation, or this in substance took place between you and said motorman; that you said to the motorman: “Why did you run down there at that rate of speed and not try to stop or ring the bell until you hit me?” And the motorman saying in reply thereto, “I didn’t see you”?

Mr. FALKNOR.—I object as suggestive and leading.

Mr. BEVINGTON.—It is the question that was put to the motorman.

The COURT.—Let him answer.

(Testimony of M. A. Hunt.)

(Exception noted for defendant.)

A. Yes, sir.

Mr. BEVINGTON. That is all.

Mr. FALKNOR.—That is all.

(Witness excused.) [234]

[Testimony of Allen Smith for Plaintiffs (Recalled in Rebuttal).]

ALLEN SMITH, recalled as a witness on behalf of plaintiffs in rebuttal, testifies as follows:

Q. (By Mr. BEVINGTON.) Mr. Smith, you heard the testimony of the motorman, Mr. Graff?

A. Yes, sir.

Q. After this accident you may state to the jury whether or not the motorman came back and had this conversation; that this in substance took place between Mr. Hunt and said motorman; that Mr. Hunt said to the motorman, "Why did you run down there at that rate of speed and not try to stop or ring the bell until you hit me?" and the motorman replied, "I didn't see you"? A. Yes, sir.

Q. (By Mr. FALKNOR.) Just those exact words? A. Just those exact words.

Q. You were standing there rolling the cigarette at the same time? A. Yes.

Q. Where do you live now? A. 4213 Bellevue.

Q. How long have you been living in Seattle?

A. Since the 14th day of March, 1913.

Q. Where did you live before that?

A. Why, I lived in Arkansas.

Q. How long did you live there?

A. I was born and raised there.

(Testimony of Allen Smith.)

Q. You came from Arkansas here? A. No.

Q. Where did you go from Arkansas? [235]

A. To Portland.

Q. Did you go directly to Portland?

A. No, sir, I came to Seattle first.

Q. You came to Seattle from Arkansas?

A. 1901, the 28th of March.

Q. Where did you go?

A. I have been a road man ever since.

Q. Where did you go?

A. I could not tell you, I have been so many places. I have been working all over Washington, Oregon and Montana.

Q. Where else haven't you been?

A. Well, there is a good many places.

Q. You are a kind of a globe trotter, aren't you?

A. Not exactly.

Mr. HAMMOND.—We object to this as impertinent.

The COURT.—The question has been answered.

(Witness excused.)

Mr. HAMMOND.—Did you introduce these photographs in evidence?

Mr. FALKNOR.—No.

Mr. HAMMOND.—Do you object to their being introduced?

Mr. FALKNOR.—No, put them in if you want to.

(Photographs received in evidence and marked "Defendant's Exhibits E and F.")

Mr. BEVINGTON.—Counsel suggested that he wanted the jury to see the car.

(Testimony of Allen Smith.)

Mr. FALKNOR.—Now, your Honor, I explained that. If the car had not been in another accident I would be only too glad for the jury to see it. [236]

The COURT.—I don't think under the testimony in this case that the jury could gather any information by inspecting the car. I think both sides have gone into this matter very fully. There is nothing that the jury can determine by viewing the premises that would justify the Court in having the premises viewed.

Mr. HAMMOND.—I think that is all, your Honor.

Mr. FALKNOR.—Your Honor, there are one or two matters I would like to present to your Honor briefly.

The COURT.—The jury may be excused from the courtroom until called.

(Whereupon the jury leaves the courtroom.)

[Motion of Defendant for Directed Verdict, etc.]

Mr. FALKNOR.—The defendant at this time, your Honor, challenges the sufficiency of the testimony to sustain a verdict for the plaintiff, and requests your Honor to withdraw the case from the consideration of the jury and direct them to return a verdict for the defendant. Now, I do that for the reason that under the ordinances the street-car company has the right of way, and that anyone approaching the street as Mr. Hunt was, knowing that it was a street upon which street-cars were operated, and going by any obstruction where his view of an approaching car would be obstructed, was obligated to go in such a way and in such a manner and at such a speed that

if a car was coming he could stop his automobile in time to avoid a collision.

The COURT.—I don't think I care to hear from you, Mr. Falknor, upon this one proposition, at least. I think this matter must be submitted to the jury.

(Argument by Mr. FALKNOR.) [237]

The COURT.—This is a matter for the jury.

Mr. FALKNOR.—I am not feeling any too well, anyway, and I anticipate your Honor is against me on my general motion.

The COURT.—Yes, the motion is denied. Exception allowed.

(Exception noted for defendant.)

Mr. FALKNOR.—I want to make another motion.

The COURT.—I was going to give you my view upon that phase. Irrespective of some other elements that might enter into the case there is some testimony here that this automobile ran up to the street-car track, right near it, and stopped and was there, and the motorman of the approaching car could see him for a sufficient distance to stop the car.

Mr. FALKNOR.—There isn't any evidence to that effect.

The COURT.—The plaintiff testified to that, and if the car was there and the motorman saw he was in that dangerous condition then the car had no right to run him down. That is a matter the jury must determine, and it is not for the Court to say.

Mr. FALKNOR.—I don't think, Your Honor, that the doctrine of last clear chance is in this case.

The COURT.—There is no doctrine of last clear chance in that sense.

Mr. FALKNOR.—This is what is in my mind. That plaintiff did not testify how far the street-car was from him when he brought his automobile to a stop, but they both testified that they met contemporaneously, especially Mr. Bevington.

The COURT.—I don't care to argue it with you.

Mr. FALKNOR.—Then at this time I ask that the Court withdraw from the consideration of the jury all evidence as to the damage to the car, for the reason that the evidence shows [238] that neither of the plaintiffs ever paid the damages, and they are not now obligated to pay the damages.

The COURT.—What do you say to that.

Mr. HAMMOND.—I have this to say, that until this car was taken from him he had the right to use the car.

The COURT.—No, the element of damages to the car, for the repairs.

Mr. HAMMOND.—Oh, for the repairs.

The COURT.—That is what you asked to have withdrawn from the jury, the claim for repairs?

Mr. FALKNOR.—Yes, the claim for repairs.

Mr. HAMMOND.—I am not sure about that myself.

The COURT.—I am. I think it should be withdrawn.

Mr. HAMMOND.—I am inclined to think probably that is right.

The COURT.—That part of the motion will be granted.

Mr. HAMMOND.—As to the repairs?

The COURT.—Yes.

(Whereupon the Court takes a short recess, after which the jury returns to the courtroom, and are conceded to be all present by both sides.)

(Whereupon the case is argued to the jury by Messrs. Hammond, Falknor and Bevington following which the Court instructs the jury, and the jury retires to consider of their verdict.) [239]

[Instructions of Court to Jury.]

Second Exception.

The Court instructs the jury as follows:

The COURT.—The issue which is submitted to you, gentlemen of the jury, and which is for you to determine, is made by the complaint of the plaintiffs in this case, the answer to this complaint, and the reply. These pleadings you may take to your jury room, but they are not to be considered as evidence in the case. You will find the complaint has two counts. That simply means there is a separate statement of two claims for recovery. You can read these pleadings over in the jury-room if you care to do so, and wherever an allegation is made in the complaint and admitted in the answer that establishes that fact. No proof need be offered upon that allegation. Where there is an allegation made in the complaint and the defendant states it has neither knowledge or information sufficient to form a plea with relation to that particular allegation, that amounts in law to a denial and must be proven the same as those specifically denied, and wherever a denial appears in the answer to any matter set forth in the complaint, or a denial of any matter set forth in the affirmative defense that must be established by a fair

preponderance of the evidence.

The defendant in this case has pleaded what in terms of law is contributory negligence on the part of the plaintiff; that is, such conduct on the part of the plaintiff, Mr. Hunt, which was the proximate cause of the injury, and without which the injury would not have happened.

The burden of proof is upon the defendant to establish that fact by a fair preponderance of the evidence upon all [240] of the matters in the complaint which are denied. The burden is upon the plaintiffs to establish those facts by a fair preponderance of the testimony.

The issue, very briefly stated, is this: The plaintiff, Mr. Hunt, states that he and Mary A. Hunt are husband and wife, and are a community under the law of the state, and alleges that on the day named in the complaint here, about the 23d day of September, 1913, the community was the owner of an automobile, and Mr. Hunt was driving this automobile along 27th Avenue over onto Cherry Street, on which the defendant railway company is operating a street railway line, and this car was operated in such a negligent manner and at such an excessive rate of speed that as he entered upon this street this street-car ran into his automobile and injured the automobile and injured himself.

In the one cause of action he states the injury to the automobile, and sets forth the amount of recovery, and in the next count he states practically the same facts and then recites the injury which was done to himself personally, and enumerates the money dam-

age which he seeks to recover.

These counts simply mean under the law that when a man has two claims he has got to set them up separately, and all you are concerned with in relation to these is simply the facts. There are two claims for recovery, one for the automobile and the loss of the use of the automobile, and the other for the injury to himself individually.

As I stated a moment ago, the defendant says that if any injury happened on this occasion it was brought about [241] by the negligence of the plaintiff himself which contributed to it as the proximate cause thereof.

The burden of proof is upon the plaintiff to establish, as I said a moment ago, all of the facts of his complaint by a fair preponderance of the evidence, and upon the matter of contributory negligence that must be established by the defendant by the same preponderance.

Now, what is meant by preponderance of the evidence is not the greater number of witnesses testifying to any fact or to a particular state of facts, but it is the testimony of the witnesses which carries the greatest convincing force or power to your minds. The testimony of one witness may outweigh the testimony of many witnesses if it is of such a character and of such a nature as to convince you of its truthfulness. In determining the weight or credit you desire to attach to the testimony of any of the witnesses you will take into consideration the attitude of the witness upon the witness stand, his manner and demeanor in testifying, his interest or lack of

interest in the result of this controversy, the reasonableness of the story which he reveals to you, and likewise the opportunity of the several witnesses for knowing the things about which they have testified; in fact, surround every witness who has testified before you with about the same tests, and treat him with the same relations that you would to any man in the ordinary affairs of life whose statements you may be considering, as to the weight that ought to be accorded to it. You will apply to each witness that has testified before you the same tests you would apply in the ordinary affairs of life, and if you find that any [242] witness has wilfully testified falsely concerning any material fact in the case you have the right to disregard his entire testimony except in so far as it may be corroborated by the testimony of other credible witnesses and the circumstances developed upon the trial of the case. You will surround all of these witnesses with the surroundings and environment as you gather it from the testimony with relation to this incident on this occasion, and then determine where the weight of the evidence is.

You are instructed that negligence in a legal sense is the failure to observe for the protection of the interests of another that degree of care and caution and vigilance which the circumstances demand, whereby such other person suffers an injury. It is the omission to do something which a reasonable and prudent man, guided by the directions which regulate the conduct of human affairs, would do, or the doing of something which a reasonably prudent man would not do.

The basis of liability in a negligence case is the violation of some legal duty to exercise care, and in your deliberations of this case you will consider this definition of negligence and will determine the degree of care that should be exercised by the persons upon whom responsibility may have been placed, as defined to you by these instructions, and then apply that degree of care to the facts in this case, and see whether there was any act of omission or commission which a reasonably prudent man under the circumstances would not have done, would not have been guilty of.

Now, contributory negligence is such conduct as [243] exhibits the want or lack of ordinary care which contributed to the acts of the defendant and resulted in the injury as the proximate cause of such injury, and without which conduct on the part of the plaintiff the injury would not have occurred, and as I stated to you a moment ago, the burden of proof in establishing that is upon the defendant.

In this case, in deliberating upon this case, you will determine, as I said a moment ago, the care an ordinarily prudent man under like circumstances would exercise, and then determine whether the plaintiff in this case, Mr. Hunt, did exercise that care upon this occasion, as was required of him, and whether his conduct contributed to the injury as the proximate cause thereof, or whether, even though the defendant may have been negligent in some instances, if that negligence did not result in the injury as the proximate cause thereof, or determine whether or not, even though the plaintiff was guilty of some neg-

ligence whether that contributed to the negligence of the defendant as the proximate cause thereof, or whether the negligence of the defendant was the cause of the injury as the proximate cause thereof.

You are instructed that ordinary care is such a degree of care and caution as a reasonably prudent man would use under like circumstances and conditions. The care required in operating street-cars, or by a person in driving upon the street in an automobile in front of approaching cars, is such as an ordinarily prudent and cautious man would exercise under like conditions and circumstances, and is proportionate to the danger to be guarded against [244] and the fatal consequences which are likely to come if it is omitted.

You are instructed that the relative rights and duties of the street-car company, the defendant in this case, in the operation of cars over and along the streets of the City of Seattle, and those pedestrians and drivers of automobiles, and other vehicles, are equal and reciprocal, and neither has a superior right of way upon said street over the other, except that the street railway car running upon fixed tracks can not turn out and get away as can other vehicles and automobiles, and it therefore has the right of way to the track upon which the rails are fixed, and that vehicles driven along the street in the same way that the car is running must give way and give the street-car the right of way. Each must operate upon the street with relation to such conditions, and it is the duty of the street railway company while operating its cars upon the street to keep constant and reason-

ably careful lookout for pedestrians, vehicles or automobiles upon the street or about to enter upon the street and upon its tracks, and the failure to do so would be negligence on the part of the company in the event that an injury occurred because of such omission to have this lookout.

The street-car must also, in moving along the street, sound a gong or ring a bell upon approaching a street crossing so as to advise persons of the approach of the car, and in this connection you are instructed that a person operating an automobile over and along the streets of the city is bound to exercise the same degree of care and caution in driving along the street and in crossing the [245] street as is the driver or motorman of a street-car, and that while the street-car can not be heedlessly moving along upon its track, neither can a person drive an automobile heedlessly over and upon the street-car track without exercising the same degree of care and caution as would be exacted from the street-car company.

You are instructed that the law considers the operation of a street-car and the operation of an automobile on a public street to have in them an element of danger to the public, and when operated at an excessive rate of speed to be a menace to public safety, and has therefore fixed a limit upon the speed at which they shall be operated in certain places, and when such vehicles are operated at a speed in excess of that provision within the restricted district and an injury is occasioned thereby, then the law presumes that the injury was the result of the excessive

speed, and casts the burden of proof upon such party to show that the injury, if any was occasioned, was not the result of its or his negligence, and when both parties, the plaintiff and defendant, run at excessive rates of speed it is for the jury to determine the conduct or negligence of which was the proximate cause of the injury.

You are instructed that by ordinance of the City of Seattle it is provided that no person shall propel or cause to be propelled any street-car within the business or settled residential districts of the city at a speed exceeding twelve miles per hour, and that under the provisions of this ordinance the operation of a street-car in the business or settled residential district in excess of twelve miles per hour, in case of an injury resulting from [246] such excessive speed, it would be presumed under the law that the company would be negligent in its operation. In the consideration of this ordinance it will be for you to determine the speed at which the car was operated, and in determining whether or not the car was moving at an excessive rate of speed you will take into consideration whether the point at which the collision occurred came within the limited districts in the ordinance as above stated, which limits the speed to twelve miles per hour, and if you find that it did and the car was running to exceed twelve miles per hour than it will be presumed in the first instance that the company was negligent if an injury resulted, and the burden of proof would be upon the company to show that it was in fact not negligent, even though the car was running at such excessive rate of speed,

and that the injury occasioned was caused by the negligence of the plaintiff as the proximate cause thereof. But if you should find that the place was not within the district restricted in the ordinance than you will determine whether the car was running at such a reasonable rate of speed which of itself was not negligent, taking into consideration all of the surroundings as disclosed by the evidence.

You are instructed likewise that under the law of the State the speed of an automobile in a city shall not be greater than twelve miles per hour, nor over a crossing of a street or crosswalk within the limits of any city at a greater speed than four miles per hour, and you are instructed that if a person does drive an automobile the restricted places in the city provided in the State statute at a greater speed than that provided and an [247] injury should occur, the presumption would be that the automobile driver was negligent, and the burden would shift upon the driver of the automobile under such circumstances to show that the excessive speed was not the proximate cause of the injury and therefore contributory negligence upon his part.

So that you may fully understand these instructions in view of the circumstances of this case I will say that I mean that if you should find that the automobile at issue was driven by the plaintiff at a greater speed than twelve miles per hour on 27th Avenue approaching Cherry Street, and more than four miles an hour in crossing Cherry Street, and an injury resulted, the presumption of law would be that he was guilty of negligence, and if he seeks to

recover for the injury resulting to himself the presumption would be that his contributory negligence was the proximate cause of the injury, and it would pass the burden upon him to show that his negligence did not contribute to the injury as the proximate cause thereof.

The fact that you may find that the automobile was driven at a greater rate of speed does not preclude recovery in this case if you should find that the rate of speed at which the automobile did cross the street there was not the proximate cause of the injury, but that the operation of the street car was the proximate cause which resulted in the injury.

You are further instructed that if you should find from the evidence in this case that the plaintiff was running his car along 27th Avenue and as he approached [248] Cherry Street, over which the street-car was operating, he stopped his car at or near the railway track of the defendant company and was unable immediately to start it again, and the place where he stopped was such a distance from the approaching car that the motorman could have seen him in time to stop the street-car, and the motorman saw him, or should have seen the condition in which he was and that he was unable to move his car, and failed to stop his car when he saw the peril in which the plaintiff with his automobile was in, and continued the speed of his car and ran into the automobile, under such circumstances the railway company would be charged with negligence, and would be liable for damages which followed, irrespective of any speed at which the automobile had been moving

prior to the time that it stopped.

But if you should find that the plaintiff was driving along 27th Avenue at a high rate of speed, and approached the street-car track at an excessive rate of speed, as defined in these instructions, and that the street-car coming down Cherry Street approached 27th Avenue at about the same time, and the automobile ran into the street-car, and you believe by a fair preponderance of the evidence that the speed at which the automobile was operating and the failure of the plaintiff to observe the approaching car was the proximate cause of the injury, and without which it would not have happened, under such circumstances the plaintiff's conduct would be, under the law, acts which contributed to the injury as the proximate cause thereof, and he could not recover.

You are instructed that the plaintiff in approaching [249] Cherry Street, upon which the railway track is situated, has the right to presume that the motorman in charge of the car would not run his car at an excessive rate of speed, nor in violation of the city ordinance, and also that the motorman would sound his bell or gong as he approached the street intersection, and would take the usual precautions in the operation of the car upon approaching the cross-street; and the motorman upon the street-car had the right to rely upon the fact that no person would run into the street upon which the railway track was situated at a greater rate of speed than that provided by law, and that a person would take the usual precautions by looking before driving upon the cross-street.

The duties between the plaintiff and the defendant company were reciprocal with relation to the conduct that should have been enjoyed or employed by either of them, and it is for you to determine which one was negligent with relation to the duty imposed in this case, and if you find that the defendant was negligent in the operation of its car, and that the plaintiff was free from contributory negligence which contributed to the resulting injury as the proximate cause thereof, but that the injury and damage was the proximate result of the defendant's conduct, then you will return a verdict for the plaintiff in this case.

But if you believe from the testimony in this case that the plaintiff was negligent in the operation of his automobile, and that his negligence resulted in the injury complained of as the proximate cause thereof, then the plaintiff could not recover in this case, and your [250] verdict must be for the defendant.

In determining this issue and in considering the conduct on the part of the motorman and the plaintiff in this case you will take into consideration the surroundings there as described by the witnesses; the apartment house upon the corner of 27th Avenue and Cherry Street, the movement of the car and the movement of the automobile, and observe from this testimony how far, or when the plaintiff saw the coming car or should have seen it if the automobile was operating at the rate permitted by law, and likewise whether the street-car motorman could have seen the automobile approaching if he had been looking and operating the car as the law limited, and from all

these determine who violated the duty which was imposed and fix it as you find it.

In this case if you should find that the defendant was not negligent or that it was negligent but that its negligence did not result in this injury as the proximate cause thereof, but that the contributory negligence of the plaintiff was the proximate cause thereof, then your verdict would be for the defendant in this case.

But if you find by a preponderance of the evidence in this case that the defendant was negligent and that the plaintiff was not negligent, or that the plaintiff may have been negligent, but that his negligence did not operate with relation to the injury, and was not the proximate cause thereof, but that the injury resulted from the negligence of the defendant, then you would return a verdict for the plaintiff in this case.

If you should determine for the plaintiff you are [251] instructed that you could not consider in this case any amount which the plaintiff claims for repairs to the automobile, as he never paid any of those charges and none are charged against him, as the testimony discloses.

You are instructed, however, that you may find for such reasonable service as he might have obtained out of the automobile if the injury had not been occasioned, up to the 5th day of February, 1914, and in determining what that was worth you will determine what the use of that car would be reasonably worth, not what the automobile would earn irrespective of any charges in its operation, but what it would rea-

sonably earn above the expenditures, and you will find for such sum as will reasonably compensate the plaintiff for any injury which he sustained himself. You will include such sum as he has paid out for doctors' bills or medicine as disclosed by the testimony, and not to exceed seventy-five dollars, and also such sum as will compensate him for time which he actually lost by reason of the injury. Now, these items can be established by direct and positive testimony, and you will base your conclusions upon these items upon the testimony which has been offered and admitted in this case, and then you can also return such an amount as the plaintiff sustained by reason of the pain and suffering, and such injuries as are reasonably certain to follow in the future.

No rule can be given you by the Court that shall govern you in determining what should be found, if anything. That is a matter that must be left with you as reasonable men and as based upon the testimony which has been placed [252] before you. You will take into consideration the testimony of the witnesses and analyse it and apply it to the plaintiff and to the injury which he suffered, and such as are reasonably certain to follow in the future, and determine what such sum should be, and determine that in a lump sum and add this to the other sums which you find him to be damaged for, loss of time and the doctors' and medicine charges, and insert it in your verdict.

You, gentlemen of the jury, will pass upon this matter fairly and impartially just the same as you would want twelve men to pass upon a matter in

which you might be interested in the same manner, either as plaintiff or as defendant. You will eliminate from your minds all questions of sympathy or prejudice either for one side or the other, and determine this question upon the basis of right and justice, and after you reach the stage of damages to place that upon a financial basis and determine what sum, in your honest judgment, will compensate the plaintiff for the damages which he reasonably sustained and are reasonably certain to follow in the future.

Two forms of verdict will be submitted. One is, "We the jury in the above-entitled case find for the defendant." If that is your verdict cause it to be signed by your foreman. The other form of verdict is as follows: "We the jury in the above-entitled case find for the plaintiffs and assess their damages in the sum of ———— dollars," which you will insert, and cause that to be signed by your foreman.

You are the sole judges of the facts in this case, and you must determine what the facts are. If I have referred [253] to any fact or indicated any opinion I have it was simply to illustrate or demonstrate some proposition of law. The Federal Court in this district does not comment upon the testimony at all or try to give to the jury any opinion the presiding judge may have of any fact, but that is left solely to the jury, and you must determine that yourself, and in determining that you will take into consideration the matters I have referred to in the consideration of the testimony of the several witnesses, and the law to govern the case you will take from the Court as I have given it to you.

(Whereupon exceptions are taken to the Court's instructions by counsel for both sides, and the jury retires to consider of their verdict.)

[Exceptions to Instructions.]

In the foregoing charge of the Court to the jury the Court gave the following instruction; "And when such vehicles are operated at a speed in excess of that provision within the restricted district and an injury is occasioned thereby, then the law presumes that the injury [254] was the result of the excessive speed, and casts the burden of proof upon such party to show that the injury, if any was occasioned, was not the result of its or his negligence"; To the giving of which, before the jury retired to consider of their verdict, the defendant duly excepted, which exception was allowed.

The above and foregoing transcript of the evidence introduced upon the trial, and offered in support of the defendant's first exception is all the evidence given upon the trial of the action, and the defendant offers the same, with all the exhibits, together with the Court's instructions heretofore set out, as a bill of exceptions in support of this its second exception.

[Third Exception.]

In the charge of the Court to the jury the Court gave the following instruction; "You are instructed that by ordinance of the City of Seattle it is provided that no person shall propel or cause to be propelled any street-car within the business or settled residential districts of the city at a speed exceeding twelve miles per hour, and that under the provisions of this ordinance the operation of a street-car in the busi-

ness or settled residential districts in excess of twelve miles per hour, in case of any injury resulting from such excessive speed, it would be presumed under the law that the company would be negligent in its operation''; To the giving of which, before the jury retired to consider of their verdict, the defendant duly excepted, which exception was allowed.

The above and foregoing transcript of the evidence [255] introduced upon the trial and offered in support of the defendant's first exception is all of the evidence given upon the trial of the action, and the defendant offers the same, with all exhibits, together with the Court's instructions set out in the defendant's second exception, as a bill of exceptions in support of this, its third exception.

[Fourth Exception.]

In the charge of the Court to the jury the Court gave the following instruction: If you find that it did and the car was running to exceed twelve miles per hour then it will be presumed in the first instance that the company was negligent if an injury resulted, and the burden of proof would be upon the company to show that it was in fact not negligent, even though the car was running at such excessive rate of speed, and that the injury occasioned was caused by the negligence of the plaintiff as the proximate cause thereof''; To the giving of which, before the jury retired to consider of their verdict, the defendant duly excepted, which exception was allowed.

The above and foregoing transcript of the evidence introduced upon the trial and offered in support of the defendant's first exception is all of the evidence

given upon the trial of the action, and the defendant offers the same with all the exhibits, together with the Court's instructions set out in the defendant's second exception, as a bill of exceptions in support of this, its fourth exception. [256]

[Fifth Exception.]

In the charge of the Court to the jury the Court gave the following instruction: "You are instructed, however, that you may find for such reasonable service as he might have obtained out of the automobile if the injury had not been occasioned, up to the 5th day of February, 1914." To the giving of which, before the jury retired to consider of their verdict, the defendant duly excepted, which exception was allowed.

The above and foregoing transcript of the evidence introduced upon the trial and offered in support of the defendant's first exception is all of the evidence given upon the trial of the action, and the defendant offers the same with all the exhibits, together with the Court's instructions set out in the defendant's second exception, as a bill of exceptions in support of this, its fifth exception.

WHEREUPON counsel for the defendant presents the foregoing as its bill of exceptions, in the above case, and prays that the same may be settled, allowed, signed and certified by the judge of said Court.

JAMES B. HOWE,

A. J. FALKNOR,

Attorneys for Defendant. [257]

*In the District Court of the United States for the
Western District of Washington, Northern Division.*

No. 2700.

M. A. HUNT and MARY A. HUNT, His Wife,
Plaintiffs,

vs.

PUGET SOUND TRACTION, LIGHT & POWER
COMPANY, a Corporation,
Defendants.

Order Allowing Bill of Exceptions.

The foregoing Bill of Exceptions having been duly served upon the attorneys for said plaintiffs within due time, and ten days having elapsed after such service, and said plaintiffs not having proposed any amendment or amendments to said Bill of Exceptions, the said Bill of Exceptions having been duly delivered by the opposing party to the Clerk of said Court for the Judge thereof, and said Clerk having delivered said Bill of Exceptions to said Judge and the said Judge having duly designated a time for settling said Bill of Exceptions and said Clerk having duly notified and informed both parties to said action of the time so designated, and said Bill of Exceptions conforming to the truth and being in proper form;

Now, therefore, I the undersigned Judge of the above named Court and the Judge who tried the above-entitled action, hereby certify that the above and foregoing Bill is a true Bill of Exceptions and the same is approved, allowed and settled, and

ordered filed in and made a part of the record in said cause.

Done in open Court this 21st day of Nov, 1914.

JEREMIAH NETERER,

Judge. [258]

*In the District Court of the United States for the
Western District of Washington, Northern Division.*

No. 2700.

M. A. HUNT and MARY A. HUNT, His Wife,
Plaintiffs,

vs.

PUGET SOUND TRACTION, LIGHT & POWER
COMPANY, a Corporation,
Defendant.

**Affidavit [of A. J. Falknor Re Bill of Exceptions,
etc.].**

State of Washington,
County of King.—ss.

A. J. Falknor, being first duly sworn, on oath says: That he is now and ever since the commencement of the foregoing entitled action has been one of the Attorneys of Record for the defendant; that the proposed Bill of Exceptions herein was served upon the attorneys for plaintiffs, as appears by the acknowledgment thereon, on the 26th day of October, 1914; that more than ten days have elapsed since such service and that the said plaintiffs have not proposed any amendment or amendments to said Bill of Exceptions, and affiant, as one of the attorneys for the

said defendant, delivers said Bill of Exceptions to the Clerk of the above-entitled Court for the Judge thereof.

A. J. FALKNOR.

Subscribed and sworn to before me this 7th day of November, 1914.

[Seal]

R. E. SHARPE,

Notary Public in and for the State of Washington,
Residing at Seattle.

Copy of the within Bill of Exceptions proposed by Defendant, received and due service acknowledged this 26th day of October, 1914.

T. F. BEVINGTON,

F. E. HAMMOND,

Attorneys for Plaintiffs.

[Indorsed]: Defendant's Proposed Bill of Exceptions. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Nov. 21, 1914. Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy.

[259]

**[Request of Plaintiffs to Set Aside Verdict of Jury
and Cause be Set Down for New Trial, etc.]**

*In the District Court of the United States for the
Western District of Washington, Northern Divi-
sion.*

No. 2700.

M. A. HUNT and MARY A. HUNT, His Wife,
Plaintiffs,

vs.

PUGET SOUND TRACTION, LIGHT & POWER
COMPANY, a Corporation,
Defendant.

To the Honorable District Court of the United States
for the Western District of Washington, North-
ern Division, Honorable JEREMIAH NET-
ERER, Judge:

Come now the above named plaintiffs, M. A. Hunt
and Mary A. Hunt, his wife, by Hammond & Ham-
mond, and T. F. Bevington, Esq., their attorneys, and
without confessing any errors on the part of the Jury
or this Honorable Court herein, request this Honor-
able Court to set aside the verdict of the Jury, hereto-
fore rendered in this cause, and the judgment entered
in this Court on the 2d day of November, A. D. 1914,
in favor of the plaintiffs and against the defendant,
and that said cause be set down for a new trial; the
said plaintiffs hereby consenting to said order, and

move this Honorable Court to enter an order to that end.

T. F. BEVINGTON,
HAMMOND & HAMMOND,
Attorneys for Plaintiffs.

Consent to New Trial.

Copy of within Request and Consent for New Trial received and acknowledged this 20th day of November, 1914.

JAMES B. HOWE,
A. J. FALKNOR,
Attorneys for Deft. [260]

[Indorsed]: Request and Consent for New Trial. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Nov. 20, 1914. Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy. [261]

*In the District Court of the United States for the
Western District of Washington, Northern Division.*

No. 2700.

M. A. HUNT and MARY A. HUNT, His Wife,
Plaintiffs,

vs.

PUGET SOUND TRACTION, LIGHT & POWER
COMPANY, a Corporation,
Defendant.

Order Denying Request of Plaintiffs for New Trial.

Now, on this —— day of November, 1914, this matter coming regularly on to be heard by the Court, on the written request of the plaintiffs to set aside the verdict of the Jury, and the judgment heretofore entered thereon by this Court, and to set said cause down for retrial; the plaintiffs appearing by T. F. Bevington, Esq., and Hammond & Hammond, their attorneys, and the defendant appearing by James B. Howe, Esq., and A. J. Falknor, Esq., its attorneys; the defendant by its attorneys, in open Court objects to the granting of said request, unless the plaintiffs will pay all expenses to date and concede the trial Court to be in error as to the matters and things set forth in defendant's assignments of error; and said counsel for plaintiffs refusing to concede any error in the trial of the cause, or pay said expense, and counsel for defendant insisting upon their right to proceed with the review of the cause in the Circuit Court of Appeals; and the Court having heard the statements of counsel and the same having been fully submitted and duly considered;

Now, therefore, it is hereby considered, ordered and adjudged that the said request of said plaintiffs for a new trial, be, and the same is hereby denied.

Done in open Court this 23d day of November, A. D. 1914.

JEREMIAH NETERER,
Judge. [262]

Copy of within Order received and due service of same acknowledged this 23d day of November, 1914.

JAMES B. HOWE,
A. J. FALKNOR,
Attorneys for Defendant.

[Indorsed]: Order Denying Request of Plaintiffs for New Trial. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Nov. 24, 1914. Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy.

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 2700.

M. A. HUNT and MARY A. HUNT, His Wife,
Plaintiffs,

vs.

PUGET SOUND TRACTION, LIGHT & POWER
COMPANY, a Corporation,
Defendant.

Assignment of Errors.

Comes now the Puget Sound Traction, Light & Power Company, a Corporation, the defendant above named, in connection with its petition for writ of error herein, and makes the following assignment of errors, and particularly specifies the following as the error upon which it will rely and which it will urge upon the prosecution of its said writ of error in the above-entitled cause, and which it avers occurred upon the trial of said cause, to wit:

I.

The Court erred in rendering judgment in favor of the plaintiffs and against the defendant.

II.

The Court erred in overruling and denying defendant's challenge to the sufficiency of the evidence to sustain the verdict for the plaintiffs and in overruling defendant's motion to instruct the jury to return a verdict for the defendant. [263]

III.

The Court erred in giving the following instruction to the jury, to wit:

"And when such vehicles are operated at a speed in excess of that provision within the restricted district and an injury is occasioned thereby, then the law presumes that the injury was the result of the excessive speed, and casts the burden of proof upon such party to show that the injury, if any was occasioned, was not the result of its or his negligence."

IV.

The Court erred in giving the following instruction to the jury, to wit:

"You are instructed that by ordinance of the City of Seattle it is provided that no person shall propel or cause to be propelled any street-car within the business or settled residential districts of the city at a speed exceeding twelve miles per hour, and that under the provisions of this ordinance the operation of a street-car in the business or settled residential districts in excess of twelve miles per hour, in case of any injury resulting from such excessive speed, it would be presumed under the law that the company

would be negligent in its operation.”

V.

The Court erred in giving the following instruction to the jury, to wit:

“If you find that it did and the car was running to exceed twelve miles per hour then it will be presumed in the first instance that the company was negligent if an injury resulted, and the burden of proof would be upon the company to show that it was in fact not negligent, even though the car was running at such excessive rate of speed, and that the injury occasioned was caused by the negligence of the plaintiff as the proximate cause thereof.”

VI.

The Court erred in giving the following instruction to the jury, to wit:

“You are instructed, however, that you may find for such reasonable service as he might have obtained out of the automobile if the injury had not been occasioned, up to the 5th day of February, 1914.” [264]

WHEREFORE said Puget Sound Traction, Light & Power Company, plaintiff in error, prays that said judgment of the District Court of the United States for the Western District of Washington, Northern Division, be reversed, and that said Court be instructed to grant a new trial of said cause.

JAMES B. HOWE,

A. J. FALKNOR,

Attorneys for Defendant.

[Indorsed]: Assignment of Errors. Filed in the U. S. District Court, Western Dist. of Washington,

Northern Division. Nov. 18, 1914. Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy. [265]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 2700.

M. A. HUNT and MARY A. HUNT, His Wife,
Plaintiffs,

vs.

PUGET SOUND TRACTION, LIGHT & POWER
COMPANY, a Corporation,
Defendant.

Petition for Writ of Error.

And now comes Puget Sound Traction, Light & Power Company, a corporation, defendant herein, and says: That on the 2d day of November, 1914, this court entered judgment herein in favor of plaintiffs above named and against the defendant above named, in which judgment and the proceedings had prior thereto in this cause certain errors were committed to the prejudice of this defendant, all of which will appear in detail from the assignment of errors which is filed with this petition.

WHEREFORE, this defendant prays that a writ of error issue in its behalf out of the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of errors so complained of, and that a transcript of the record and proceedings with all things concerning the same, duly authenticated, be

sent to the United States Circuit Court of Appeals for the Ninth Circuit.

JAMES B. HOWE,

A. J. FALKNOR,

Attorneys for Defendant. [266]

[Indorsed]: Petition for Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Nov. 18, 1914. Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy. [267]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 2700.

M. A. HUNT and MARY A. HUNT, His Wife,
Plaintiffs,

vs.

PUGET SOUND TRACTION, LIGHT & POWER
COMPANY, a Corporation,
Defendant.

**Order Allowing Writ of Error [and Fixing Amount
of Bond].**

On this 18th day of November, 1914, came the defendant Puget Sound Traction, Light & Power Company, a corporation, by its attorneys, and filed herein and presented to the Court its petition, praying for the allowance of a writ of error and an assignment of errors intended to be urged by it, praying also that a transcript of the record and proceedings in said cause, with all things concerning the

same, be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

On consideration whereof, the Court does hereby allow the writ of error prayed for. It is further ordered that a bond, in the sum of Fifteen Hundred Dollars (\$1500.00), conditioned according to law, be executed in behalf of the above-named defendant, with good and sufficient surety, to be approved by the undersigned, and that upon said bond being executed, approved and filed, the said judgment in this cause shall forthwith be superseded and all proceedings in this cause stayed until the final determination of said writ of [268] error by the United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 18th day of November, 1914.

JEREMIAH NETERER,

District Judge of the United States, for the Western
District of Washington, Presiding in said Circuit.

[Indorsed]: Order Allowing Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Nov. 18, 1914. Frank L. Crosby, Clerk. By E. M. L., Deputy. [269]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 2700.

M. A. HUNT and MARY A. HUNT, His Wife,
Plaintiffs,

vs.

PUGET SOUND TRACTION, LIGHT & POWER
COMPANY, a Corporation,

Defendant.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS,
that we, Puget Sound Traction, Light & Power Com-
pany, a corporation, defendant above named as prin-
cipal, and the Massachusetts Bonding & Insurance
Company, a corporation duly organized and existing
under and by virtue of the laws of the State of
Massachusetts, and duly authorized and empowered
to become surety upon bonds and to transact busi-
ness as a surety company in the State of Washington,
as surety, are held and firmly bound unto M. A. Hunt
and Mary A. Hunt, his wife, plaintiffs above named,
in the sum of Fifteen Hundred Dollars (\$1500.00),
lawful money of the United States, to be paid to said
M. A. Hunt and Mary A. Hunt, their heirs, execu-
tors, administrators and assigns, for which payment,
well and truly to be made, we do hereby bind our-
selves, our and each of our successors and assigns,
jointly and severally, firmly by these presents.

Sealed with our seals and dated at Seattle, Wash-

ington, this 18th day of November, A. D. 1914.
[270]

Whereas, lately, at a District Court of the United States, for the Western District of Washington, Northern Division, in a suit pending in said court, between M. A. Hunt and Mary A. Hunt, his wife, and Puget Sound Traction, Light & Power Company, a corporation, defendant, a judgment was rendered in favor of said plaintiffs and against said defendant in the sum of Five Hundred Dollars (\$500.00) and costs, and the said Puget Sound Traction, Light & Power Company having obtained a writ of error, and filed a copy thereof in the office of the clerk of said court, to reverse the judgment in the aforesaid suit, and a citation directed to said M. A. Hunt and Mary A. Hunt, plaintiffs, as aforesaid, citing and admonishing them to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, State of California, in said circuit;

Now therefore, the condition of the above obligation is such that if the said Puget Sound Traction, Light & Power Company shall prosecute its writ of error to effect and shall answer all costs and damages that may be awarded against it, including all just damages for delay and costs and interest on the appeal, if it shall fail to make its plea good, then the above obligation to be void; otherwise to remain in full force and effect.

It is hereby expressly agreed by said surety that in case of a breach of any condition hereof, the above-named District Court of the United States for the

Western District of Washington, Northern Division, may, upon notice to said surety of not less than ten (10) days, proceed summarily in the above-entitled action to ascertain the amount which said surety is bound to pay on account of such breach, and render [271] judgment therefor against said surety, and award execution therefor.

[Seal]

PUGET SOUND TRACTION, LIGHT &
POWER COMPANY,

By A. L. Kempster,

[Corporate Seal]

Manager.

Attest: JAMES B. HOWE,

Assistant Clerk.

MASSACHUSETTS BONDING & INSUR-
ANCE COMPANY,

By F. B. POTWIN,

Attorney-in-fact.

The foregoing bond is hereby approved as a bond on writ of error and supersedeas bond, this 18th day of November, 1914.

JEREMIAH NETERER,

Judge of the District Court of the United States,
Presiding in the United States District Court
for the Western District of Washington, North-
ern Division.

[Indorsed]: Bond on Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Nov. 18, 1914. Frank L. Crosby, Clerk. By E. M. L., Deputy. [272]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 2700.

M. A. HUNT and MARY A. HUNT, His Wife,
Plaintiffs,

vs.

PUGET SOUND TRACTION, LIGHT & POWER
COMPANY, a Corporation,

Defendant.

**Revised Order Directing Certification of Original
Exhibits.**

It is hereby ordered that Plaintiffs' Exhibits 1, 2, 3, 4, 5, 6, 8, 9, 10 and 11, and Defendant's Exhibits A, B, C and D, need not be set out by copy or otherwise in the transcript of record upon Writ of Error, but that the same shall be certified up to the Circuit Court of Appeals for the Ninth Circuit with the transcript of the Bill of Exceptions. This order is made in lieu of order Nov. 21, 1914.

Dated this 28th day of November, 1914.

JEREMIAH NETERER,

Judge.

[Indorsed]: Order Directing Certification of Original Exhibits. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Nov. 28, 1914. Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy. [273]

[Writ of Error (Copy).]

UNITED STATES OF AMERICA.

The President of the United States of America, to the Honorable, the Judges of the District Court of the United States, for the Western District of Washington, Northern Division, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment upon a verdict which is in the said District Court before you, or some of you, between M. A. Hunt and Mary A. Hunt, his wife, the original plaintiffs and defendants in error, and Puget Sound Traction, Light & Power Company, a corporation, the original defendant and plaintiff in error, manifest error hath happened to the damage of said Puget Sound Traction, Light & Power Company, plaintiff in error, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, California, in said circuit, on the 18th day of December next; and that the records and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein *the* correct that error, which of right and according to law and custom of the United States ought to be done.

WITNESS the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the Supreme Court of the United States, the 18th [274] day of November, in the year of our Lord one thousand nine hundred and fourteen.

FRANK L. CROSBY,
Clerk of the United States District Court of the
Western District of Washington.

[Seal]

By Ed. M. Lakin,
Deputy.

JEREMIAH NETERER,

Allowed by:

District Judge of the United States, Presiding in the
the District Court of the United States, for the
Western District of Washington, Northern Division.

Dated November 18th, 1914.

Received this 18th day of November, 1914, a true copy of the foregoing writ of error, for the defendant in error.

FRANK L. CROSBY,
Clerk of the District Court of the United States for
the Western District of Washington, Northern
Division.

ED. M. LAKIN,
Deputy. [275]

[Indorsed]: Original. No. 2700. In the District Court of the United States for the Western District of Washington, Northern Division. M. A. Hunt and Mary A. Hunt, his wife, Plaintiffs, vs. Puget Sound Traction, Light & Power Co., a Corporation, Defendant. Writ of Error. Filed in the U. S. District

Court, Western Dist. of Washington, Northern Division, Nov. 18, 1914. Frank L. Crosby, Clerk. By E. M. L. Deputy. James B. Howe. A. J. Falknor, P. O. and Office Address Room 403 Pacific Building. 7th Ave. and Olive St., Seattle, Wash. Attorneys for Defendant. [276]

*In the District Court of the United States for the
Western District of Washington, Northern Division.*

No. 2700.

M. A. HUNT and Mary A. HUNT, Plaintiffs,
Plaintiffs,

vs.

PUGET SOUND TRACTION LIGHT & POWER
COMPANY, a Corporation,
Defendant.

Citation on Writ of Error (Copy).

United States of America.

The President of the United States of America, to
M. A. Hunt and Mary A. Hunt, Greeting:

You are cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, at the courtroom of said Court, in the City of San Francisco, in the State of California, within thirty (30) days after the date of this citation, pursuant to writ of error filed in the clerk's office of the District Court of the United States, for the Western District of Washington, Northern Division, wherein Puget Sound Traction, Light & Power Company is plaintiff in error, and you are defendants in

error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the Supreme Court of the United States, the [277] 18th day of November, in the year of our Lord one thousand nine hundred and fourteen.

JEREMIAH NETERER,

Judge of the District Court of the United States,
Presiding in the District Court of the United
States for the Western District of Washington,
Northern Division.

Copy of within Citation received and service acknowledged this 18th day of Nov., 1914.

HAMMOND & HAMMOND,

T. V. BEVINGTON,

Attorneys for Plaintiff.

[Indorsed]: Original. No. 2700. In the District Court of the United States for the Western District of Washington, Northern Division. M. A. Hunt and Mary A. Hunt, his wife, Plaintiffs, vs. Puget Sound Traction, Light & Power Co., a Corporation, Defendant. Citation on Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Nov. 18, 1914. Frank L. Crosby, Clerk. By E. M. L. Deputy. James B Howe. A. J. Falknor P. O. and Office Address Room 403 Electric Building, 7th Ave. and Olive St., Seattle, Wash. Attorneys for Defendant. [278]

*In the District Court of the United States for the
Western District of Washington, Northern Division.*

No. 2700.

M. A. HUNT and MARY A. HUNT, his wife,
Plaintiffs,

vs.

PUGET SOUND TRACTION LIGHT & POWER
COMPANY, a Corporation,
Defendant.

**Acknowledgment of Service [of Papers on Writ of
Error].**

Due and timely service of Petition for Writ of Error, Assignment of Errors, Bond of Error, Order Allowing Writ of Error herein is hereby acknowledged by receipt of true and correct copies of petition for Writ of Error, Assignment of Errors, Bond on Writ of Error and Order Allowing Writ of Error on the 18 day of November, 1914.

HAMMOND & HAMMOND,
T. V. BEVINGTON,

Attorneys for Plaintiffs.

[Indorsed]: Acknowledgment of Service. Filed in the U. S. Dist. Court, Western Dist. of Washington, Northern Division, Nov. 18, 1914. Frank L. Crosby, Clerk. By E. M. L. Deputy. [279]

*In the District Court of the United States for the
Western District of Washington, Northern Division.*

No. 2700.

M. A. HUNT and Mary A. HUNT, his wife,
Defendants in Error,

vs.

PUGET SOUND TRACTION LIGHT & POWER
COMPANY, a Corporation,
Plaintiff in Error

Praeceptum for Transcript of Record.

To the Clerk of the Above-entitled Court:

You will please prepare, certify and forward, as provided by law, to the United States Circuit Court of Appeals, for the Ninth Circuit, as the record on writ of error to the District Court of the United States, for the Western District of Washington, Northern Division, a complete transcript of the following files, records and proceedings in the above-entitled cause, to wit:

Complaint.

Answer.

Reply.

Verdict.

Judgment.

Stipulation Extending Time to File Bill of Exceptions.

Order Granting Extension of Time to File Bill of Exceptions. [280]

Bill of Exceptions and Proof of Service Thereto Attached.

Assignment of Errors.

Petition for Writ of Error.

Order Allowing Writ of Error.

Bond on Writ of Error.

Writ of Error.

Citation on Writ of Error.

Acknowledgment of Service.

Order Directing Certification of Original Exhibits.

This Praecipe

JAMES B. HOWE,

A. J. FALKNOR,

Attorneys for Plaintiff in Error.

Waiver of Act of February 13, 1911.

We waive the provisions of the Act approved February 13, 1911, and direct that you forward type-written transcript to the Circuit Court of Appeals for printing as provided under Rule 105 of this Court.

JAMES B. HOWE,

A. J. FALKNOR,

Attorneys for Plaintiff in Error.

[Indorsed]: Praecipe of Transcript of Record. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Nov. 21, 1914. Frank L. Crosby, Clerk. By E. M. L. Deputy.
[281]

*In the District Court of the United States for the
Western District of Washington, Northern Divi-
sion.*

No. 2700.

M. A. HUNT and Mary A. HUNT, his wife,
Plaintiffs,

vs.

PUGET SOUND TRACTION LIGHT & POWER
COMPANY, a Corporation,
Defendant.

**Certificate of Clerk U S. District Court to Transcript
of Record, etc.**

United States of America,
Western District of Washington.—ss.

I, Frank L. Crosby, Clerk of the United States District Court for the Western District of Washington, do hereby certify the foregoing printed pages numbered from 1 to 281, inclusive, to be a full, true, correct and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause as are necessary to the hearing of said cause on Writ of Error therein in the United States Circuit Court of Appeals for the Ninth Circuit, and as is stipulated for by counsel of record herein, as the same remain of record and on file in the office of the Clerk of said District Court and that the same constitute the record on return to said Writ of Error herein from the Judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred [282] and paid in my office by or on behalf of the Plaintiff in Error for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit:

Clerk's fee (Sec. 828 R. S. U. S.) for making record, certificate or return—610 folios at 15¢.....	91.50
Certificate of Clerk to transcript of record— 4 folios at 15¢.....	.60
Seal to said Certificate.....	.20
Certificate of Clerk to Original Exhibits—3 folios at 15¢.....	.45
Seal to said Certificate....	.20
I further certify that Defendant in Error paid the following amount into my office:	
Clerk's fee (Sec. 828 R. S. U. S.) for making copy of Request and Consent for New Trial and Order Denying Request of Plaintiffs for New Trial—5 folios at 15¢.	.75
<hr/>	
\$93.70	

I hereby certify that the cost for preparing and certifying record amounting to \$92.95 has been paid to me by James B. Howe, Esq., and A. J. Falknor, Esq., Attorneys for Plaintiff in Error, and I further certify the sum of \$.75 has been paid me by T. F. Bevington, Esq., and Messrs. Hammond & Hammond, Attorneys for Defendants in Error.

I further certify that I hereby attach and herewith

transmit the original Writ of Error and original Citation issued in this cause.

IN WITNESS WHEREOF I have hereto set my hand and affixed the seal of this District Court at Seattle, in said District, this 2d day of January, 1915.

[Seal]

FRANK L. CROSBY,

Clerk. [283]

[Writ of Error (Original).]

UNITED STATES OF AMERICA.

The President of the United States of America, to the Honorable, the Judges of the District Court of the United States, for the Western District of Washington, Northern Division, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment upon a verdict which is in the said District Court before you, or some of you, between M. A. Hunt and Mary A. Hunt, his wife, the original plaintiffs and defendants in error, and Puget Sound Traction, Light & Power Company, a corporation, the original defendant and plaintiff in error, manifest error hath happened to the damage of said Puget Sound Traction, Light & Power Company, plaintiff in error, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, California, in

said circuit, on the 18th day of December next; and that the records and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, which of right and according to law and custom of the United States ought to be done.

WITNESS the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the Supreme Court of the United States, the 18th [284] day of November, in the year of our Lord one thousand nine hundred and fourteen.

[Seal] FRANK L. CROSBY,
Clerk of the United States District Court for the
Western District of Washington.

By Ed. M. Lakin,
Deputy.

Allowed by:

JEREMIAH NETERER,
District Judge of the United States, Presiding in the
District Court of the United States, for the
Western District of Washington, Northern Division.

Dated Nov. 18th, 1914.

Received this 18th day of November, 1914, a true copy of the foregoing writ of error, for the defendant in error.

FRANK L. CROSBY,
Clerk of the District Court of the United States for
the Western District of Washington, Northern
Division.

Ed. M. Lakin,
Deputy. [285]

[Endorsed]: No. 2700. In the District Court of the United States, for the Western District of Washington, Northern Division. M. A. Hunt and Mary A. Hunt, His Wife, Plaintiffs, vs. Puget Sound Traction, Light & Power Co., a Corporation, Defendant. Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Nov. 18, 1914. Frank L. Crosby, Clerk. By E. M. L. Deputy. [286]

[Citation on Writ of Error (Original).]

*In the District Court of the United States for the
Western District of Washington, Northern Division.*

No. 2700.

H. A. HUNT and MARY A. HUNT, *Plaintiffs,*
Plaintiffs,

vs.

PUGET SOUND TRACTION, LIGHT & POWER
COMPANY, a Corporation,
Defendant.

UNITED STATES OF AMERICA.

The President of the United States of America, to
M. A. Hunt and Mary A. Hunt, Greeting:

You are cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, at the courtroom of said court, in the city of San Francisco, in the State of California, within thirty (30) days after the date of this citation, pursuant to writ of error filed in the clerk's

office of the District Court of the United States, for the Western District of Washington, Northern Division, wherein Puget Sound Traction, Light & Power Company is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the Supreme Court of the United States, the [287] 18th day of November, in the year of our Lord one thousand nine hundred and fourteen.

JEREMIAH NETERER,

Judge of the District Court of the United States,
Presiding in the District Court of the United
States for the Western District of Washington,
Northern Division. [288]

Copy of the within Citation received and service
acknowledged this 18 day of Nov. 1914.

HAMMOND & HAMMOND,
T. V. BEVINGTON,

Attorneys for Plaintiff.

[Endorsed]: No. 2700. In the District Court of the United States, for the Western District of Washington, Northern Division. M. A. Hunt and Mary A. Hunt, His Wife, Plaintiffs, vs. Puget Sound Traction, Light & Power Co., a Corporation, Defendant. Citation on Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Nov. 18, 1914. Frank L. Crosby, Clerk. By. E. M. L., Deputy. [289]

*In the District Court of the United States for the
Western District of Washington, Northern Division.*

No. 2700.

M. A. HUNT and MARY A. HUNT, His Wife,
Plaintiffs,

vs.

PUGET SOUND TRACTION, LIGHT & POWER
COMPANY, a Corporation,
Defendant.

Order Enlarging Time.

Now, on this 12th day of December, 1914, upon motion of Messrs. James B. Howe and A. J. Falknor, and for sufficient cause appearing;

IT IS ORDEDED, That the time within which the Clerk of this Court may prepare, certify and transmit to the United States Circuit Court of Appeals the transcript of the record in this cause be, and the same is hereby extended to and including the 9th day of January, 1915.

JEREMIAH NETERER,
District Judge.

[Indorsed]: Order Enlarging Time. Filed in the U. S. District Court, Western Dist. of Washington, Dec. 12, 1914. Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy.

[Endorsed]: No. 2546. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to—— to File

Record thereof and to Docket Case. Filed Jan. 4, 1915. F. D. Monckton, Clerk.

[Endorsed]: No. 2546. United States Circuit Court of Appeals for the Ninth Circuit. Puget Sound Traction, Light & Power Company, a Corporation, Plaintiff in Error, vs. M. A. Hunt and Mary A. Hunt, His Wife, Defendants in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Western District of Washington, Northern Division.

Filed January 4, 1915.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals,
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

*In the Circuit Court of Appeals for the United States
for the Ninth Circuit.*

No. —.

PUGET SOUND TRACTION, LIGHT & POWER
COMPANY, a Corporation,

Plaintiff in Error,

vs.

M. A. HUNT and MARY A. HUNT, His Wife,
Defendants in Error.

**Praeipie for Entry of Appearance of Attorneys for
Plaintiff in Error.**

To the Clerk of the Above-named Court:

You will please enter our appearance as attorneys
for plaintiff in error in the above-entitled action.

JAMES B. HOWE,

A. J. FALKNOR,

Attorneys for Plaintiff in Error. Office Address:
403 Electric Building, Seattle, Washington.

[Endorsed]: No. 2546. In the Circuit Court of
Appeals of the United States for the Ninth Circuit.
Puget Sound Traction, Light & Power Company, a
Corporation, Plaintiff in Error, vs. M. A. Hunt and
Mary A. Hunt, His Wife, Defendants in Error.
Praeipie for Entry of Appearance of Attorneys for
Plaintiff in Error. Filed Jan. 4, 1915. F. D.
Monckton, Clerk.

*In the Circuit Court of Appeals of the United States
for the Ninth Circuit.*

No. —.

PUGET SOUND TRACTION, LIGHT & POWER
COMPANY, a Corporation,

Plaintiff in Error,

vs.

M. A. HUNT and MARY A. HUNT, His Wife,
Defendants in Error.

Statement of Record to be Printed.

To the Clerk of the Above-named Court:

You will please cause to be printed the entire record in the above-entitled action, including the certificate of the Clerk of the District Court of the United States for the Western District of Washington, thereto, this statement, the order of said District Clerk of said District Court to prepare and transmit to the above named court the record on appeal and return to writ of error, and the entry of appearance for plaintiff in error.

A statement of the documents to be printed, which includes the entire record in said action, is as follows:

1. This Statement.
2. Complaint.
3. Answer.
4. Reply.
5. Verdict.
6. Judgment.
7. Stipulation Extending Time to File Bill of Exceptions.

8. Order Granting Extension of Time to File Bill of Exceptions.
9. Bill of Exceptions and Proof of Service Thereto Attached.
10. Assignment of Errors.
11. Petition for Writ of Error.
12. Order Allowing Writ of Error.
13. Bond on Writ of Error.
14. Writ of Error.
15. Citation on Writ of Error.
16. Acknowledgment of Service.
17. Order Directing Certification of Original Exhibits.
18. Praecipe for Transcript of Record.
19. Plaintiff's Request for and Consent to a New Trial.
20. Order Denying Plaintiff's Request for and Consent to a New Trial.
21. Entry of Appearance for Plaintiff in Error.

JAMES B. HOWE,

A. J. FALKNOR,

Attorneys for Plaintiff in Error.

[Endorsed]: No. 2546. In the Circuit Court of Appeals of the United States for the Ninth Circuit. Puget Sound Traction, Light & Power Company, a Corporation, Plaintiff in Error, vs. M. A. Hunt and Mary A. Hunt, His Wife, Defendants in Error. Statement of Record to be Printed. Filed Jan. 4, 1915. F. D. Monckton, Clerk.

10
No. 2546

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

PUGET SOUND TRACTION,
LIGHT & POWER COMPANY, a
corporation,

Plaintiff in Error,

vs.

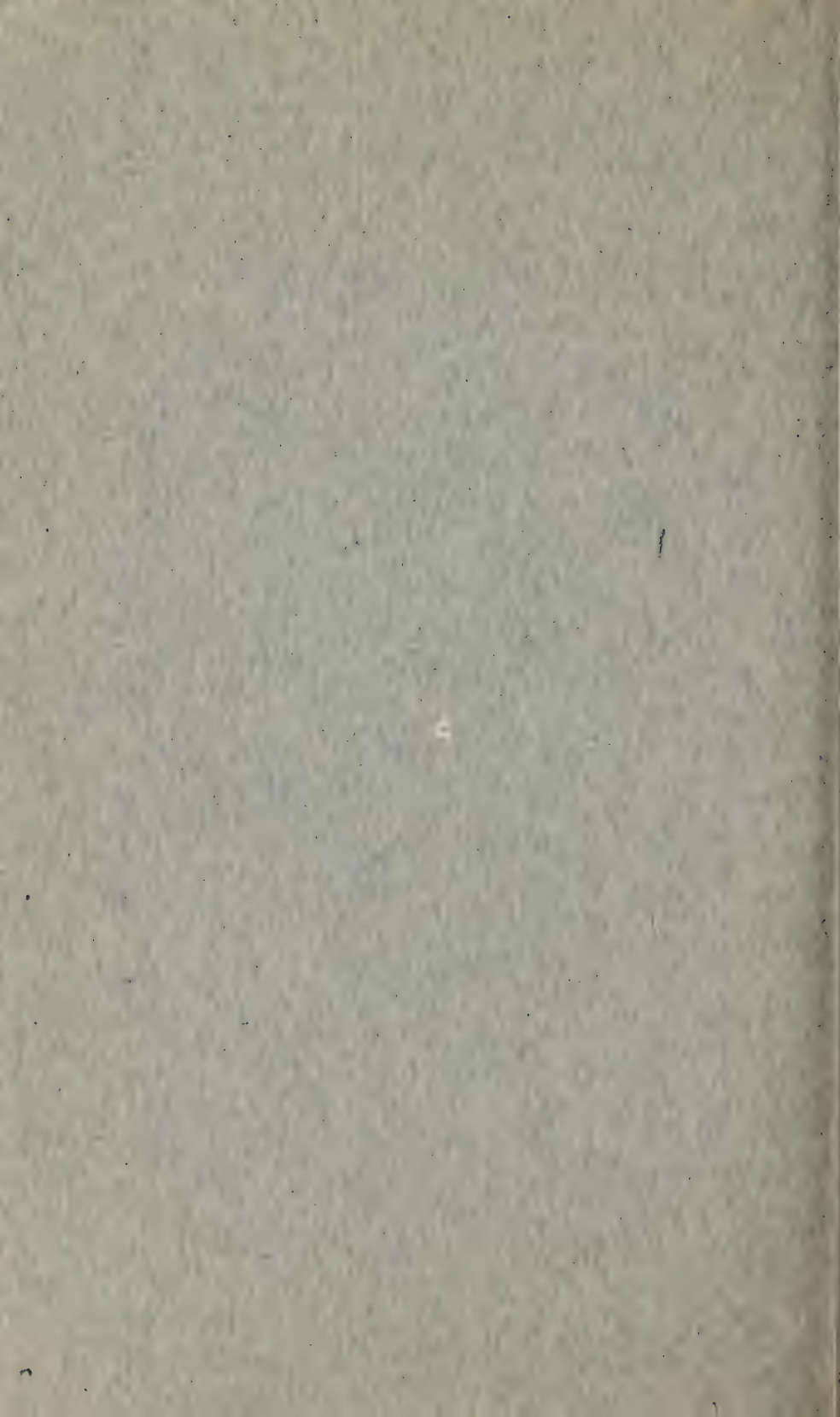
M. A. HUNT and MARY A. HUNT,
Defendants in Error.

BRIEF OF PLAINTIFF IN ERROR

UPON WRIT OF ERROR TO THE UNITED
STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION.

JAMES B. HOWE,
A. J. FALKNOR,
Attorneys for Plaintiff in Error.

Business and P. O. Address:
403 Electric Building,
Seattle, Washington.



No. 2546

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

PUGET SOUND TRACTION,
LIGHT & POWER COMPANY, a
corporation,

Plaintiff in Error,

vs.

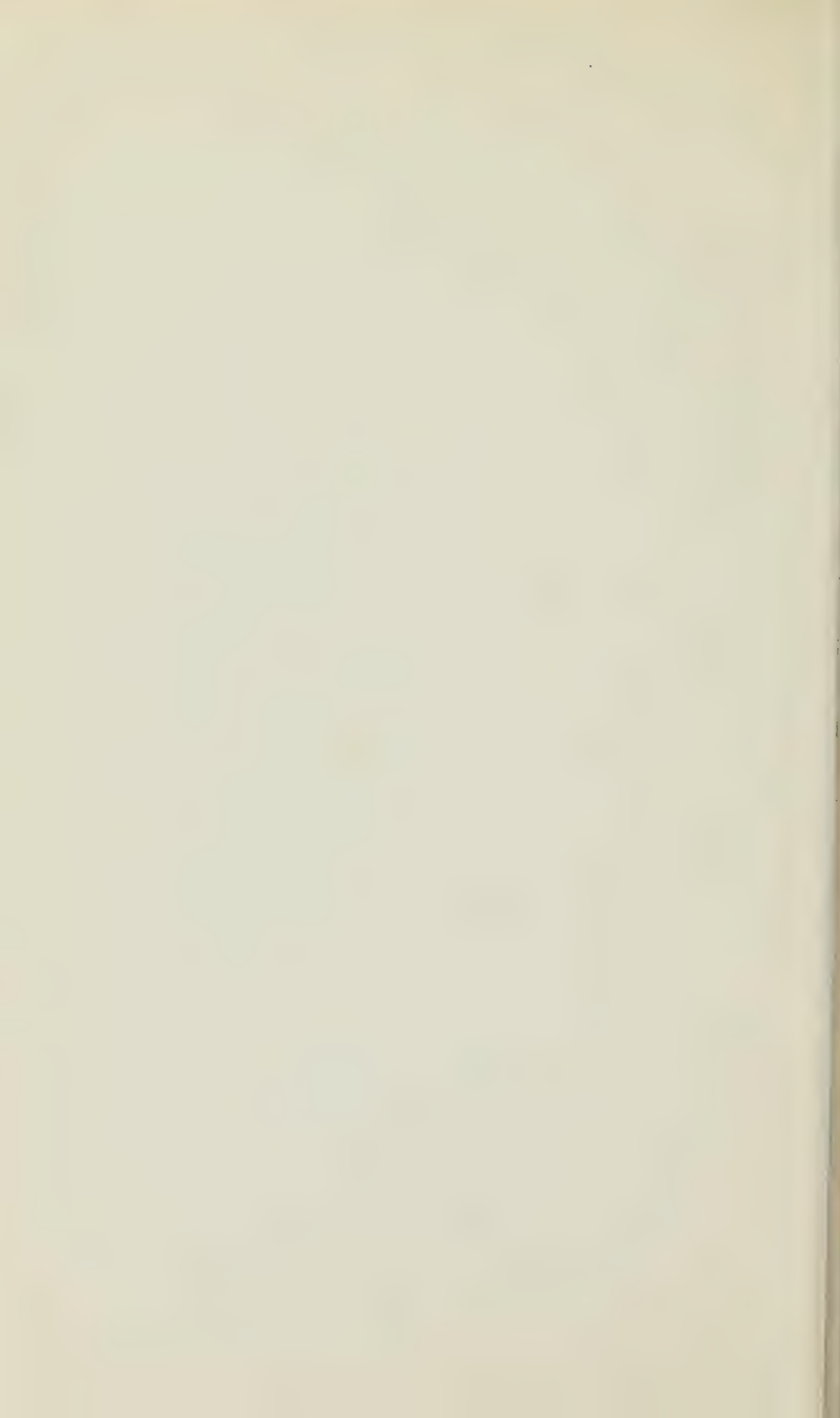
M. A. HUNT and MARY A. HUNT,
Defendants in Error.

BRIEF OF PLAINTIFF IN ERROR

UPON WRIT OF ERROR TO THE UNITED
STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION.

JAMES B. HOWE,
A. J. FALKNOR,
Attorneys for Plaintiff in Error.

Business and P. O. Address:
403 Electric Building,
Seattle, Washington.



No. 2546

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

PUGET SOUND TRACTION,
LIGHT & POWER COMPANY, a
corporation,

Plaintiff in Error,

vs.

M. A. HUNT and MARY A. HUNT,
Defendants in Error.

BRIEF OF PLAINTIFF IN ERROR

UPON WRIT OF ERROR TO THE UNITED
STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION.

STATEMENT OF THE CASE

This is an action for personal injuries and damage to property alleged to have resulted to defendants in error as a result of a collision between a street car owned and operated by plaintiff in error and

an automobile driven by M. A. Hunt, one of the defendants in error, in the City of Seattle. Defendants in error were the plaintiffs, and plaintiff in error the defendant, in the court below, and to avoid confusion the parties will be referred to hereafter simply as plaintiffs and defendant instead of as defendants in error and plaintiff in error.

The complaint contains two counts. The first count after alleging that plaintiffs are husband and wife and that the defendant is a Massachusetts corporation, owning and operating a double track electric street railway upon East Cherry Street in the City of Seattle alleges in substance that at about 11:00 o'clock A. M. on September 23, 1913, while plaintiff, M. A. Hunt, was driving plaintiffs' automobile on 27th Avenue which intersects East Cherry Street, and when the said automobile had reached East Cherry Street, defendant and its employes negligently permitted one of its eastbound street cars to collide with said automobile, resulting in damage to the automobile for which recovery is sought. The complaint further alleges that defendant was negligent in operating its car at a dangerous and unlawful rate of speed, in failing to sound the gong of the street car, in failing to check the speed of the car as it approached the crossing, and in failing to stop the street car after the motorman

saw, or should have seen that a collision was imminent. (Record pp. 2-5)

The second count contains substantially the same allegations as the first except that in this count the plaintiffs claim damages for personal injuries alleged to have been received by plaintiff, M. A. Hunt. (Record pp. 6-11)

The answer admits that defendant owns and operates an electric street railway upon East Cherry Street, and that on September 23, 1913, plaintiff, M. A. Hunt, was driving an automobile on 27th Avenue but denies all other allegations of both counts of the complaint, and pleads as an affirmative defense to each count that whatever injuries or damages, if any, plaintiffs sustained were caused and contributed to by the careless and negligent acts of plaintiff, M. A. Hunt. (Record pp. 12-17)

The allegations of the affirmative defense are put in issue by plaintiffs' reply. (Record pp. 17-19)

The issues being made up the cause was tried before a jury on September 24, 1914. (Record p. 21) At the close of all the evidence defendant challenged the sufficiency of the evidence to sustain a verdict for plaintiffs for the reason that the evidence showed that the damages sustained by plaintiffs were caused by the negligence of plaintiff, M. A. Hunt, and asked the court to instruct the jury to return a

verdict for defendant. This motion was denied. (Record p. 25)

The cause was then submitted to the jury who on September 26, 1914, returned a verdict for plaintiffs for \$500.00, and on November 2, 1914, the court entered judgment in accordance with the verdict. (Record p. 21)

Neither defendant nor plaintiffs petitioned the lower court for a new trial but on November 20, 1914, (two days after the issuance of the writ of Error; Record pp. 271-272), plaintiffs filed what they termed a request for a new trial, in which, without confessing any errors on the part of the jury or Court, they request the Court to set aside the verdict of the jury and set the case down for a new trial. (Record 258-259) When this request was heard defendant objected to the granting of a new trial unless the plaintiff would concede the trial court to be in error as to the matters set forth in defendant's Assignments of Error, which plaintiffs refused to do, and the court thereupon denied plaintiffs' so called request for a new trial. (Record pp. 260-261)

From the judgment entered in accordance with the verdict this writ of error is prosecuted. (Record pp. 264-274)

SPECIFICATIONS OF ERROR

I

The Court erred in overruling defendant's challenge to the sufficiency of the evidence to sustain a verdict for plaintiffs and request that the court instruct the jury to return a verdict for defendant. (Record pp. 25-26, 234-235)

II

The Court erred in instructing the jury as follows:

"And when such vehicles are operated at a speed in excess of that provision within the restricted district and an injury is occasioned thereby, then the law presumes that the injury was the result of the excessive speed, and casts the burden of proof upon such party to show that the injury, if any was occasioned, was not the result of its or his negligence." (Record pp. 243-244, 252)

III

The Court erred in instructing the jury as follows:

"If you find that it did and the car was running to exceed twelve miles per hour then it

will be presumed in the first instance that the company was negligent if any injury resulted, and the burden of proof would be upon the company to show that it was in fact not negligent, even though the car was running at such excessive rate of speed, and that the injury occasioned was caused by the negligence of the plaintiff as the proximate cause thereof:" (Record pp. 244-245, 253)

SPECIFICATION OF ERROR NO. I

Error of the Court in Refusing to Direct a Verdict for Defendant

The record shows that East Cherry Street is a paved street running approximately east and west in the city of Seattle. 27th Avenue is a paved street running north and south and intersecting East Cherry Street at a right angle. Defendant owns and operates a double-track electric street railway upon East Cherry Street.

At about 10:40 o'clock a. m. (Record, p. 89) on September 23, 1913, the plaintiff, M. A. Hunt, was driving an automobile northerly on 27th Avenue with the intention of turning, when he reached the intersection of 27th Avenue and East Cherry Street, and proceeding westerly on East Cherry Street. (Record p. 40) Before, however, he had reached the first, or eastbound street car track, his auto was struck by an eastbound street car approaching

from the west. For the apparent purpose of avoiding the car, Mr. Hunt, before reaching the track, turned his automobile to the left, and in the direction of the approaching car. (Record p. 35) Hunt insisted that the automobile came to a stop before the collision (Record, p. 35) and two of his witnesses testified to the same effect (Record, pp. 111, 124), but according to the witnesses for defendant the automobile did not come to a stop before the impact. (Record, pp. 169, 183, 188) The fender admittedly did not strike the automobile, but the automobile first came in contact with the street car at a point back of the fender on the right hand side of the car. (Record, pp. 41, 112, 138, 168, 183, 209, 226)

The principal reason advanced by Mr. Hunt for failing to see the street car in time to avoid a collision was the undisputed fact that at the southwest corner of the intersection of 27th Avenue and East Cherry Street is a large, three-story apartment house. It is important, therefore, to have in mind the relation of this building to the adjoining streets and street car tracks.

The apartment house in question has a 60-foot frontage on the west side of 27th Avenue, (Record, p. 100; Plffs' Ex. "2") and a 92-foot frontage on East Cherry Street. (Record, p. 30; Plffs' Ex. "2") The east-bound street cars are operated upon the

southerly track. From the most southerly rail of the street car track to the south curb of East Cherry Street is 16 feet, and from the curb to the apartment house it is 12 feet, making a distance of 28 feet from the most southerly rail of the street car track to the apartment house. (Record, p. 33) 27th Avenue is 60 feet wide. (Record, p. 31) On the west side of 27th Avenue the apartment house is $17\frac{1}{2}$ feet from the outer edge of the curb. (Record, pp. 31-32) The paved portion is 25 feet wide. (Record, p. 31) Both 27th Avenue and East Cherry Street are paved at the point of the accident. (Record, p. 231) At its intersection with 27th Avenue, East Cherry Street is practically level. (Record, pp. 64, 170) There was no obstruction on the sidewalk north of the apartment house that would interfere with ordinary view to the west except the telephone poles. (Record, p. 33) At the time of the accident the streets were dry. (Record, p. 89)

Mr. Hunt was driving a six-cylinder Hudson automobile weighing 3980 pounds, and $15\frac{1}{2}$ feet in length. (Record, p. 42) A Mr. Bevington, one of plaintiffs' attorneys in the court below, (Record, p. 1) and who also has presented a claim against the defendant growing out of this same accident (Record, p. 139) was seated in the automobile in the front seat to the left of Mr. Hunt. (Record, pp. 37, 121) it was conceded by Mr. Hunt and his

witnesses that before the automobile reached East Cherry Street it was going between 15 and 22 miles an hour. (Record, pp. 39, 94, 108) Mr. Hunt knew that street cars were operated on East Cherry Street. (Record, p. 88)

When the automobile entered Cherry Street Mr. Hunt testified he had slowed down his automobile to 8 miles an hour, (Record, p. 40) and other witnesses called by him testified substantially to the same effect. (Record, pp. 95, 116, 122) Defendant's witnesses, however, placed the speed of the automobile as it entered East Cherry Street much higher than this. The motorman testified that when he saw the auto it was about 30 feet from the south curb on East Cherry Street and was going "between 25 and 30 miles an hour." Record, p. 167) Mr. Ellis, a passenger, fixed the speed of the auto at this time at "faster than the street car" (Record, p. 188) and that of the street car at 12 miles an hour. (Record, p. 194) Mr. Holloway testified the automobile at this time was going between 10 and 15 miles an hour. (Record, p. 201) Mr. Atkinson, who was in the automobile business and selling the Hudson car, testified he had examined the marks left by the wheels of the automobile as it entered East Cherry Street; that the wheels had slid from 12 to 15 feet, and that to make these marks the

auto must have been going 25 miles an hour. (Record, pp. 212-213)

As it entered East Cherry Street the left wheel of the automobile was just off the center of the street. (Record, pp. 66-67) Since 27th Avenue is 60 feet wide (Record, p. 31) the automobile must at that time have been about 30 feet east of the west line of 27th Avenue and the apartment house.

Plaintiffs' witnesses placed the speed of the street car as it approached 27th Avenue at 30 miles an hour. (Record, pp. 40, 95, 119, 125) The defendant's witnesses fixed the speed at from 12 to 15 miles an hour. (Record, pp. 170, 182, 194, 201-202, 208)

Plaintiffs' witnesses testified that the gong of the car was not sounded until about the time of the collision (Record, pp. 87, 114, 129) while the defendant's witnesses insisted that the motorman sounded his rotary gong from the time he reached the west end of the apartment house (Record, pp. 180, 184, 201) 92 feet west of 27th Avenue. (Record, p. 30) But whether the gong was sounded or not is unimportant in view of the testimony of Mr. Hunt that he looked for the car, and must have seen it coming as soon as he passed the apartment house.

Mr. Hunt testified that when he came out on Cherry Street he looked for a car "as quick as he

could see.” (Record, p. 66) Mr. Bevington testified on behalf of plaintiffs to the same effect. (Record, p. 133) However, Mr. Hunt and Mr. Bevington insisted that they did not see the street car approaching from the west as soon as they passed the apartment house because of a covered delivery wagon (Record, pp. 39, 123) standing somewhere between the main entrance and back entrance of the apartment house, (Record, pp. 42, 123) which they claim was standing so that they were looking at the front end of the wagon, which was about $4\frac{1}{2}$ or 5 feet wide. (Record, p. 142) The rear entrance is at the west side and the main entrance is at the middle of the apartment house on East Cherry Street. (Plffs’ Ex. “2”) Since the apartment house has a 92-foot frontage on East Cherry Street (Record, p. 30) the main entrance must be about 46 feet and the rear entrance 92 feet west of 27th Avenue. The delivery wagon must, therefore, have been between 50 and 90 feet west of East Cherry Street. While other witnesses for the plaintiffs testified as to the presence of this delivery wagon between the main entrance and the west end of the apartment house (Record, pp. 97, 110), defendant’s witnesses testified that they did not see a delivery wagon in front of the apartment house. (Record, pp. 177, 184, 202) On the contrary the motorman upon the approaching car testified that he saw the

automobile when it was about 30 feet from the curb on East Cherry Street (Record, p. 167), and that there was practically nothing on the street, and everything was clear. (Record, p. 177) Mr. Boehn, a passenger on the car, saw the auto when "it was coming north on 27th" and he "didn't see anything to prevent the man in the auto from seeing the street car," or "anything that was obstructing his vision." (Record, p. 183) Mr. Ellis, another passenger standing on the rear of the car (Record, p. 187), testified that "the automobile was about 30 feet from East Cherry Street" when he first saw it; and that there was nothing he saw to prevent the driver of the automobile seeing the car at that time; that he could see the automobile plainly. (Record, p. 188) Still another passenger, a Mr. Holloway, testified that he saw the automobile when it was between 25 and 30 feet from East Cherry Street, (Record, pp. 203, 204) and that there was nothing in the street to prevent the driver of the automobile from seeing the street car. (Record, p. 202)

The testimony of two interested witnesses that an ordinary delivery wagon fronting towards the observers, standing at least 80 feet away should totally obstruct the view of a large street car 46 feet long (Record, p. 36) must, we submit, be viewed with grave suspicion, especially where it is squarely

contradicted by at least three wholly disinterested witnesses who testified positively that there was nothing to obstruct the view of Mr. Hunt after he passed, and even before he reached, the north side of the apartment house. Moreover, as we shall see later, according to Hunt's own testimony the car must have already passed this delivery wagon, if it existed, before Hunt passed the apartment house.

With respect to the distance of the street car when the automobile reached East Cherry Street—defendant's witnesses without exception place it not over 60 feet from the point of collision when the automobile passed the apartment house. The motor-man testified that after the front of his car got about 10 or 15 feet from 27th Avenue the automobile came in view (Record, p. 178) about 30 feet from the curb running between 25 or 30 miles an hour. (Record, p. 167) L. J. Ellis, a passenger, testified that the street car was about 30 feet from the corner when he saw the automobile (Record, p. 191) about 30 feet from East Cherry Street. (Record, p. 188) C. A. Holloway, another passenger, testified that when the street car was 30 feet west of 27th, Mr. Hunt was between 25 and 30 feet south of East Cherry Street on 27th Avenue. (Record, p. 203)

While Mr. Hunt's and Mr. Bevington's general estimate of the distance of the car when they first saw it, is in apparent conflict with this testimony, the testimony of both Hunt and Bevington taken as a whole shows that the car must have at least passed the entrance to the apartment house when the automobile reached East Cherry Street. Mr. Hunt testified that when he first saw the street car he was at point "A" on Plaintiffs' Exhibit "2" and "on a line with the curb," and that the front end of his automobile would be 9 feet ahead of that (Record, p. 36) or about 8 feet from the track (Record, p. 69), and that the street car was then 150 to 180 feet away. (Record, p. 69)

Mr. Bevington estimates that it was then "a little beyond the west end of the apartment house" (Record, p. 123) or from 100 to 175 feet away. (Record, pp. 136-137)

Not only did this testimony fail to square with that of defendant's witnesses but it is out of harmony with the other witnesses produced by the plaintiffs who apparently had no interest in the action. Thus C. L. Malvern testified for plaintiffs that when he first saw the automobile it was 80 feet south of East Cherry Street and had not yet reached the south side of the apartment house; (Record, p. 100) that he saw the automobile and the street car at about the same time and that

when he first saw the street car it was somewhere between the point "D" (on Plaintiffs' Exhibit "2") and the west corner of the apartment house (Record, p. 94) which, as we have pointed out is 92 feet west of 27th Avenue. (Record, p. 30) He further testified that both the street car and the automobile reached "C," the point of collision, at about the same time. (Record, p. 96) The street car, he said, was going about 30 miles an hour. (Record, p. 95) According to this testimony, then, the street car was not to exceed 180 feet from the point of collision when the automobile was 80 feet from East Cherry Street, and 28 feet more (Record, p. 33) from the first rail, or 108 feet in all from the point of collision, and they both got there about the same time. It follows that when the automobile had gotten within 25 feet of the track, or more than three-quarters of the distance to the point of collision, the street car must have gone three-quarters of the distance it had to travel, or three-quarters of 180, which would be not to exceed 45 feet from the point of collision. If the automobile was nearer than 25 feet when Mr. Hunt first saw the car then the street car, at that time, must have been a corresponding distance nearer the point of collision.

The testimony of Mr. Smith on behalf of plaintiffs, is also in conflict with that of Mr. Hunt and Mr. Bevington for he says that when the automobile

was 8 feet from the track the street car was about opposite the entrance of the apartment house. (Record, p. 115) This would be about 45 feet south of East Cherry Street and 30 feet more, or half the width of 27th Avenue (60 feet; Record, p. 31), or 75 feet south of Mr. Hunt.

But not only is the testimony of Hunt and Bevington as to the distance of the car out of harmony with the testimony of plaintiffs' other witnesses and those of defendant, but it is wholly inconsistent with other testimony given by themselves. Plaintiffs' witnesses, without a dissenting voice, stated that the street car and automobile reached the point of collision about the same time. (Test. of Malvern, Record, p. 96; Test of Smith, Record, p. 120; Test. of Bevington, Record, p. 123) Mr. Hunt, himself, testified that "the street car was very close" when he got the auto stopped. (Record, p. 74) According to Hunt and Bevington the front of the automobile was not more than 8 or 10 feet from the track when they first saw the street car (Record, pp. 69-70, 122, 136) and the automobile did not go more than 12 feet, according to Bevington, from the time they first saw the street car until the collision. (Record, pp. 136-137) At that time, according to all the plaintiffs' evidence the automobile was going 8 or 10 miles an hour (Record, pp. 40, 95, 116, 122, 132, 136) and the street car 30 miles an hour. (Record,

pp. 40, 95, 119, 125) It is apparent that while an automobile is going 12 feet at 8 or 10 miles an hour a street car would not go more than four times as far, or 48 feet at 30 miles an hour. Making due allowance for the fact that the automobile was slowing up, it is apparent that the street car according to the testimony could not have been more than 50 feet from the point of collision when Hunt and Bevington claim they first saw the car.

“If a person testify in his own behalf, and there are material conflicts and contradictions in his testimony, he is not entitled to recover if he be the plaintiff, unless that portion of his testimony which is least favorable to his contention is of such a character as to authorize a recovery in his behalf.”

Atlanta R. etc. Co. v. Owens, 119 Ga. 833, 47 S. E. 213.

Western etc. R. Co. v. Evans, 96 Ga. 481, 23 S. E. 494.

“There can be no doubt of the rule that where proof, as well as pleading, is of a doubtful or equivocal character, it must be construed least favorably to the party offering it.”

2 Moore on Facts, Sec. 1261, p. 1402.

We submit that the street car must have been much nearer than the distance estimated by Mr.

Hunt when the automobile was but 8 feet from the track.

Collins v. Ry. Co., 218 Mass., 105 N. E. 639;

Johnson v. Wash. Water Power Co., 73 Wash. 616, 132 Pac. 392.

In the case last cited, which involves a collision between a street car and wagon, the court said:

“The distance the appellant traveled from the time he observed the car until he was struck by it is shown definitely. It is also shown with approximate correctness the rate of speed at which he was traveling. Taking this as a basis, *it is clear that the car was much nearer the appellant, when he entered the street and when he looked the second time, than he estimated it to be.*”

The most southerly rail of the street car track is 28 feet north of the apartment house (Record, p. 33) and the street car extended $11\frac{1}{2}$ feet beyond the rail. (Record, p. 129) The zone of danger would consequently be $26\frac{1}{2}$ feet north of the apartment house. After Mr. Hunt, sitting not more than 9 feet back from the fender of the automobile (Record, p. 42), passed the north line of the apartment house the front end of the automobile would still have to go $17\frac{1}{2}$ feet before reaching the danger zone. The street car, even, if going 30 miles an hour, could not have been more than 4 times

that distance from the point of collision. If it was as much as 75 feet away it had already passed the main entrance to the apartment house and the delivery wagon referred to by Hunt and his witnesses.

Plaintiffs' claim that Hunt's view of the car could have been shut off by a delivery wagon 80 feet away is too improbable to be treated seriously, and must, we submit, be wholly disregarded when it is borne in mind that several disinterested witnesses upon the car saw the automobile before it reached East Cherry Street and that all the testimony, including that of Hunt and Bevington, shows that the car must already have passed the wagon if there was one.

Both Hunt and Bevington testified that they looked to the west as soon as they could. Since they looked, and there was nothing to obstruct their vision, they must have seen the approaching street car which was in plain sight, for the motorman and passengers on the street car saw the automobile before it reached East Cherry Street. (Record, pp. 167, 178, 188, 201)

"There is a natural presumption that a person with good eyesight saw, or could have seen, what others in no more favorable position for observation unquestionably saw."

1 Moore on Facts, Sec. 281, page 296.

St. Louis & S. F. R. Co. v. Cundieff, (C. C. A.) 171 Fed. 319, 325.

In the case last cited the court said:

“With nothing whatever to obstruct his view or hearing, his statement that he stopped and looked seems to us contrary to all reasonable probability and in direct opposition to the physical facts as disclosed by the record.”

If Mr. Hunt saw the street car when the front of his automobile was still $17\frac{1}{2}$ feet from the car track it is an undisputed fact that he had plenty of time in which to stop his automobile. Hunt testified that when he entered East Cherry Street he was not going to exceed 8 miles an hour. (Record, p. 40) He also testified that he could stop his automobile going 8 miles an hour in 12 feet without skidding. (Record, p. 65) Robert Atkinson, who was in the automobile business and selling the Hudson car (Record, p. 212) testified that an automobile going eight miles an hour could be stopped in 4 or 5 feet if the brakes were working properly (Record, p. 213) and Mr. Hunt admitted that his brakes were all right. (Record, p. 65) We must conclude that if Mr. Hunt looked, as he says he did, as soon as he passed the apartment house, he must have seen the car, and according to the undisputed testimony he had plenty of time to stop his automobile before reaching the danger zone 18 inches south of the first rail. (Record, p. 129) He was therefore guilty of contributory negligence as

a matter of law in failing to stop his automobile in time to avoid a collision.

If, on the other hand, the driver of the automobile did not look as soon as he had a clear vision of the street to the south, or if he was going at such a speed when he passed the obstruction to his vision that he could not stop before reaching the track in case of a car being dangerously near, we submit that reasonable minds could not differ as to his contributory negligence, and that plaintiffs were not entitled to recover.

Subdivision 19, of Section 2, Ordinance No. 24597 of the City of Seattle (Defendant's Exhibit "B") provides:

"The following vehicles, in order named, shall have the right of way in the use of all streets and public places, viz: apparatus of the Fire Department, Police Patrol Wagons, Ambulances, responding to emergency calls, emergency repair wagons of the street railway companies, and U. S. Mail wagons."

Subdivision 22, of the same section and ordinance provides:

"Excepting as provided in Rule 19, *street railway cars shall be entitled to the track*, and in all cases where any team, automobile or other vehicle shall meet or be overtaken by any car upon any of the tracks of any of the street railways of the city, such team or vehicle shall give way to said car as soon as possible," etc.

Subdivision 30 of the same section and ordinance (Plaintiffs' Exhibit "1") provides:

"No person shall carelessly, heedlessly or negligently * * * propel any automobile or motor vehicle in, through, along or over any public place so that such * * * automobile or auto vehicle shall come in collision with any other animal or vehicle, or shall strike against any person."

Under the foregoing ordinance street cars are given the right of way over other vehicles.

That this is the rule independently of statute or ordinance was decided in the case of *Denver City Tramway Co. v. Norton*, 73 C. C. A. 1, 141 Fed. 599, where the court said:

"It is true that a street car company, operating its cars with electricity, has not the exclusive right to occupy the streets for its own tracks. But it does have a prior right, in the sense of a preferential right of way, over a street crossing as against the pedestrian, the equestrian, and the driver of a vehicle. Regard must be had to the respective motive powers of the two occupants of the street, their relation to the public, and their means of more or less easily avoiding collision at such junction. A street car propelled by electricity or steam is a ponderous machine. It can only move on two rails in a direct line. It cannot be turned to either side to avoid a collision in front. Its very construction and the principle on which it operates are intended for rapid transit. It carries the public under demand that it pro-

ceed as rapidly as possible, having regard to the public welfare and safety. It cannot, therefore, be expected or required, every time it approaches a public crossing, to stop or check up and take observation as to the approach of vehicles, equestrians, and pedestrians before it can proceed. It has a right to proceed in the use of its tracks on the assumption that the drivers of vehicles and others approaching such crossings will take heed of the known hazards of such a place; the reasonable, usual speed at which such car runs, and the impossibility of its deflection from its single course, or of making a sudden stop."

But irrespective of city ordinance we submit that the dictates of common prudence required that Mr. Hunt, before attempting to cross East Cherry Street upon which he knew a street railway was operated, slow down his machine to such a speed that he could readily stop before reaching the track in case a street car was dangerously near. He knew that a street railway was operated on East Cherry Street. (Record, p. 88) He knew that his view to the south was obstructed by the apartment house until the front of his automobile would be but 19 feet from the track and less than 18 feet from the zone of danger. He was not in the exercise of due care, we submit, in relying solely upon the possibility of there being no street car near, or upon the ability of the motorman to stop his car in time to avoid a collision. To look, upon reaching East

Cherry Street, would be wholly ineffectual to save him if he passed the obstruction at such a speed that he would be unable to stop before reaching the track. He was driving a vehicle which he could readily control, as compared to a street car weighing many tons. As the court said in the case of *Minneapolis Street Ry. Co. v. Odegard*, (C. C. A.) 182 Fed. 56:

“The contention that the motorman should have seen the automobile as it was approaching with the speed complained of, and should have stopped his car or accelerated its motion so as to avoid collision, is without merit. The motorman might reasonably act on the presumption that any competent chauffeur in charge of an automobile would either stop his machine as it approached the car or turn the corner and pass along by the side of the car in the direction it was moving, or otherwise avoid plunging into it. *We may take judicial cognizance of the fact, now well known, that an automobile even when going at the rate of speed complained of in this case yields ready and quick obedience to the guiding wheel in the hands of a competent chauffeur.*

“We accordingly hold that, under the state of facts disclosed by the record, the motorman had no reasonable ground to believe that the chauffeur would not stop or turn his machine before collision became inevitable, and, a fortiori, that he would recklessly drive his machine against the side of the car. No negligence is therefore imputable to him for not having seen

the approach of the automobile in time to avoid the injury."

We quote the following from the recent case of *Colborne v. Detroit United Ry.*, 177 Mich. 139, 143 N. W. 32, 35:

"This is a case of a right angle crossing, over a double track of an electric railway line. As plaintiff approached the track, he says he saw it 100 feet away. The street was clear except for the oncoming car. There was no confusion of passing conveyances, or persons, or cars running on different tracks, to perplex. *He could and should have made sure of the safety of proceeding, by looking just before entering upon the track, and at such a point that he could stop his machine if necessary in order to avoid a collision.* This rule should be as strictly applied to an automobile as to a pedestrian, and the reasons for its application are more impelling. Usually the careless pedestrian only imperils his own safety.

"In the light of common knowledge courts can well take judicial notice of the automobile, not only as a most useful and pleasing means of swiftly transporting persons and property for pleasure or business, when properly controlled and cautiously driven, but as a vehicle in its possibilities so destructive when in the hands of careless and reckless drivers as to spread over the land the maimed and dead until it has belittled the cruelties of the car of Juggernaut.

"We think the conclusions reached by the trial court, in directing a verdict for defendant,

find authority in principle in *McGee v. Railway*, 102 Mich. 107, 60 N. W. 293, 25 L. R. A. 300, 47 Am. St. Rep. 507; *Borschall v. Railway Co.*, 115 Mich. 473, 73 N. W. 551; *Hilts v. Foote*, 125 Mich. 241, 84 N. W. 139; *Merritt v. Foote*, 128 Mich. 367, 87 N. W. 262; *Measel v. Railway Co.*, 166 Mich. 688, 132 N. W. 453; *Stevenson v. Railway*, 167 Mich. 45, 132 N. W. 451; *Manos v. Railway*, *supra*; *Puffer v. Muskegon T. & L. Co.*, 139 N. W. 19; and other cases cited in these decisions."

In the case of *Clark v. N. Y. Rys. Co.*, 138 N. Y. Supp. 824, it was held that a chauffeur, driving an automobile in a city street at the rate of 10 miles per hour, so fast that he could not stop between girders in the street which obstructed his view of approaching cars and the track, with knowledge of existing conditions and the operation of a surface street railway, was guilty of negligence precluding a recovery for damages to the machine by collision with a street car. In so holding the court said:

"It was and is the duty of one having charge and operation of a vehicle upon a city street to have the same under reasonable control. That control necessarily varies in degree with the circumstances of each case and the physical conditions and hazards present, the character of the vehicle, the manner of its control, and the time necessary to bring it to a stop, if an exigency fairly to be apprehended should arise. The greater the danger, the higher degree of care required, and the more complete control of the vehicle, since the control called for is

such as may bring the vehicle to a prompt stop if occasion so requires. *Volosko v. Interurban St. R. R. Co.*, 190 N. Y. 206, 209, 82 N. E. 1090, 15 L. R. A. (N. S.) 1117. The chauffeur did not have his automobile under such control. *He admitted on the trial that he was going 10 miles an hour, so fast that he could not stop between the girders and the track, and consequently he was, in our opinion negligent."*

In *Dey v. R. Co.*, 140 Mo. App. 461, 120 S. W. 134, the driver of a vehicle was held guilty of contributory negligence where he, knowing that street cars were running both ways with great frequency at a high rate of speed, his view of the car tracks being obstructed until he was within 25 or 30 feet of the track, drove his team toward the tracks at such a rate of speed that he was unable to check it soon enough to avert a collision with a car which was 100 feet distant when he first observed it. The court said in part:

"Now it appears that the plaintiff drove down Twentieth street with full knowledge of the fact that street cars were running both ways on Olive street with great frequency and at a high speed, his team under such a headway that it was impossible for him to check them and avert a collision therewith. Of course, it was impossible for him to see the car before coming within 25 or 30 feet of the track had he looked. Nevertheless he should have approached the track with more care, and it was incumbent upon him to listen, even if he could not see the approaching car, or, at least, to have his team

under such control as to avert a possible collision when he came into view of possible dangers which a reasonably prudent person would know as likely to attend the situation."

The following is quoted from the case of *Washington St. Ry. Co. v. Lacey*, 94 Va. 460, 475, 26 S. E. 834, 839:

"The mere fact of looking and listening is not always a performance of the duty incumbent upon the traveler, for he must also exercise care to make the act of looking and listening reasonably effective. *He must not approach the track at such a rate of speed that when he reaches a point where he can see or hear the train it is too late to protect himself from injury.* He must exercise ordinary care in attempting to cross or in crossing the track; and care is never ordinary care unless it is proportionate to the known danger. 3 Elliot, R. R. Secs. 1164-1166; 2 Shear. & R. Neg. Secs. 476-478."

In the case of *Robinson v. R. Co.*, 99 Me. 47, 58 Atl. 57, 58, the court said:

"If, as the plaintiff contends, the bank of the cut was such that he could not have seen the approaching car—if he was deprived of the protection of one of his senses—so much the more he was bound to use the one which remained. If it was impossible, on account of the bank, to see a car, he had no right, in the exercise of ordinary prudence, to assume that it was impossible for a car to be behind the bank."

In the case of *Darwood v. Union Trac. Co.*, 189 Pa. St. 592, 42 Atl. 290, it was held that one who

drives at a trot upon an electric railway crossing without slowing up and looking for a car after obstructions preventing a view from the house line are passed cannot recover for injuries caused by a car even though it was traveling at an excessive speed without sounding its gong.

In the case of *Johnson v. Washington Water Power Co.*, 73 Wash. 616, it appeared that when the plaintiff, who was driving a wagon, reached the street upon which the street car was operated he saw a car approaching at a point which he described and which was shown by other evidence to be some 700 feet away. On seeing the car he drove directly along his course diagonally across the street until his horse was well into the street, when he looked again for the car and saw it about a block away. He did not look again until his horse had stepped over the first rail of the railway track at which time he saw the car quite near him. He then endeavored to swing his horse clear of the car but without avail. From the time the plaintiff first saw it until it reached him, the car was in plain view had he looked in that direction. The speed of the car was shown to have exceed the limit fixed by city ordinance. In holding that the plaintiff was guilty of contributory negligence barring his recovery the court said:

“The trial judge rested his judgment on the ground that the appellant’s own negligence contributed to the injury and we can see no escape from that conclusion. The distance the appellant traveled from the time he observed the car until he was struck by it is shown definitely. It is also shown with approximate correctness the rate of speed at which he was traveling. Taking this as a basis, *it is clear that the car was much nearer the appellant, when he entered the street and when he looked the second time, than he estimated it to be: and while he may have concluded that he had plenty of time to cross in front of it, he did not in fact have sufficient time, and did not verify his estimate by taking a look immediately before he entered the place of danger.* His injury was clearly, therefore, contributed to by his own negligence.”

In *Bowden v. Walla Walla Valley Ry. Co.*, 79 Wash. 184, the driver of an automobile approached a crossing of the street upon which he was driving and a railroad upon which a street railway was operated, on a bright, sunny afternoon. He looked for approaching cars when 150 or 175 feet from the crossing, at which time he neither heard nor saw any car. From a point 40 to 100 feet from the crossing he could have seen a car approaching for a distance of 300 feet. He did not look again until he attempted to cross the track and was struck. In holding the driver guilty of contributory negligence the court said:

“The driver of an automobile, approaching such a crossing as the one in this case, must make reasonable use of his senses to guard his own safety, and the failure to do so is negligence. Such a person cannot take a last look at one hundred and fifty to one hundred and seventy-five feet distance from the crossing, and then shut his eyes and go blindly forward. While we shall not attempt to say within what distance respondents should have looked for an approaching car before attempting the crossing, the law does require that such a look must be taken within such a distance as to enable one to ascertain whether or not there is an approaching car in sight. *Beeman v. Puget Sound Traction, Light & Power Co.*, ante p. 137, 139 Pac. 1087, and cases there cited. Had respondent taken such precaution, this accident would not have happened.”

In the case of *Stueding v. Seattle Electric Co.*, 71 Wash. 476, 128 Pac. 1058, it was held that the contributory negligence of a pedestrian struck by a street car precluded any recovery as a matter of law, notwithstanding negligence on the part of the street car company in operating its car at an excessive speed and without sounding its gong, where it appeared that he approached a street car where a car was unloading passengers and walked rapidly behind the standing car without stopping to look and was struck by the side or front end of a car passing on the other track.

In *Helliesen v. Seattle Electric Co.*, 56 Wash. 278, 105 Pac. 458, the court said:

“Pedestrians in crossing the tracks of a street railway in the day time or in the night time, knowing, as respondent knew, that the crossing was one where cars frequently passed, must use their senses to apprise them of danger, if any; they cannot heedlessly and carelessly cross the track, and throw the entire burden of their safety upon the motorman of an approaching car.”

In the case of *Bardshar v. Seattle Electric Company*, 72 Wash. 200, 130 Pac. 101, a chauffeur whose automobile was hit by an electric car at a street crossing as he started to cross the tracks behind another electric car discharging passengers on a parallel track, was held guilty of contributory negligence precluding any recovery where he undertook to cross the track from behind the standing car where his view was obstructed without having observed the other car.

In *Brown v. P. S. E. Ry. Co.*, 76 Wash. 214, 135 Pac. 999, it was held that a driver of an automobile truck, colliding with a street car approaching from 25 to 35 miles per hour was guilty of contributory negligence as a matter of law where he collided with the car in turning out to the left to pass a moving van ahead of him which momentarily hid the approaching street car from view.

It is also important to bear in mind the fact that the ordinance of the city of Seattle limited the speed of automobiles at street crossings to eight miles per hour and the state statute to four miles per hour.

Ordinance No. 30263 of the City of Seattle (Defendant's Exhibit B) provides in part:

"It shall be unlawful for any person to ride, drive or propel any automobile, autocycle, motorcycle or other motor vehicle, * * * to pass or cross any street, intersection or round any corner at a greater rate of speed than eight (8) miles an hour."

Section 2531 of Rem. & Bal. Codes and Statutes of Washington, provides:

"Every person who shall drive or operate,
* * * any automobile or motor vehicle
* * * over any crossing, cross-walk or street
intersection within the limits of any city or
town, when any person is upon the same, at
a rate of speed faster than one mile in fifteen
minutes * * * shall be guilty of a misdemeanor."

It is undisputed that when Mr. Hunt entered East Cherry Street one of his witnesses, a Mr. Smith, was standing on the northwest corner of 27th and Cherry on the north side of the street. (Record, p. 107) Mr. Hunt himself testified that as he approached East Cherry Street he saw people on East Cherry Street; automobiles running back

and forth. (Record, p. 64) Thus it is undisputed that when Mr. Hunt entered East Cherry Street there were persons at the intersection and under the state statute it was unlawful for him to operate his automobile at a greater speed than four miles an hour across the intersection. Had Mr. Hunt been going at this speed even when he concedes he first saw the car when his automobile was still 8 feet from the track, it is needless to say that he could have stopped his automobile in time to have avoided a collision.

Even under the ordinance he was not permitted to operate his automobile across East Cherry Street at a higher rate of speed than 8 miles an hour, and at this speed he could have readily stopped his automobile before reaching the danger zone for the front end of his automobile was admittedly still some 17 or 18 feet from the track and he admits he could have stopped it at that speed within 12 feet. (Record, p. 65) Had plaintiff been obeying the law the accident would have been avoided. His negligence in failing to do so must be held as a matter of law to have contributed to the accident.

Nor is there any evidence in the record from which it could reasonably be found that the motorman could have stopped his car in time to have avoided the accident after he saw that there was danger of a collision. The motorman testified that

as soon as he saw the automobile coming he threw off his power and set the emergency immediately, which was the proper way to stop his car. (Record, p. 168) It is true that the defendant's evidence tended to show that the car was going but 15 miles an hour and the motorman testified that a car going at that speed could be stopped in 38 feet. (Record, p. 171) But it must be borne in mind that if the car was going but 15 miles an hour and the car and the automobile, as the undisputed testimony shows, reached the point of collision at about the same time (Record, pp. 74, 96, 120, 123, 169) then the street car could not have been more than twice the distance of the automobile, or about 40 feet from the point of the collision when the automobile entered East Cherry Street. If it was but 40 or 50 feet from the point of the collision when the automobile was 17 or 18 feet from the track then admittedly Mr. Hunt could have seen, and did see, the street car in time to have avoided a collision since he could admittedly stop his machine going at 8 miles an hour, in 12 feet. If the motorman could have avoided the accident, it was equally within the power of Mr. Hunt to do so. If the plaintiffs' evidence is true and the street car was going 30 miles an hour then there is absolutely no evidence in the record that the street car could have been stopped in time to have avoided a col-

lision. The motorman testified that he did not know within what distance a car going 25 miles an hour could be stopped and that he would want at least half a block in which to stop a car going at that speed. (Record, pp. 171-172)

We respectfully submit that the evidence conclusively shows that Mr. Hunt either drove his automobile across Cherry Street at an unlawful speed and at such a speed that he was unable to stop the same before reaching the track or that he failed to exercise proper care to see whether or not a car was approaching from the west as soon as he passed the building which obstructed his view. In either event he was guilty of contributory negligence barring a recovery in this action, and the motion for a directed verdict should therefore have been granted.

SPECIFICATIONS OF ERROR II AND III

Error of the Court in instructing that burden of proof was on defendant to show that unlawful speed did not cause accident.

After instructing that the law had fixed a limit upon the speed of automobiles and street cars in

certain places the court gave the following instruction:

“And when such vehicles are operated at a speed in excess of that provision within the restricted district and an injury is occasioned thereby, then the law presumes that the injury was the result of the excessive speed, and casts the burden of proof upon such party to show that the injury, if any was occasioned, was not the result of its or his negligence.” (Record, pp. 243-244, 252)

And again, the court, after instructing that it was for the jury to determine the speed at which the car was operated and whether the collision occurred within the district in which the speed of street cars was limited to 12 miles per hour, instructed the jury further as follows:

“If you find that it did and the car was running to exceed twelve miles per hour then it will be presumed in the first instance that the company was negligent if an injury resulted, and the burden of proof would be upon the company to show that it was in fact not negligent, even though the car was running at such excessive rate of speed, and that the injury occasioned was caused by the negligence of the plaintiff as the proximate cause thereof.” (Record, pp. 244-245, 253)

By these instructions the jury were emphatically told that if they found that the street car at the time of the accident was going at a greater speed than allowed by ordinance, the burden of proof was

then cast upon the defendant to show that the injury was not the result of its negligence. This instruction was unquestionably error. It is fundamental that the burden rests on the plaintiff in personal injury actions not only to prove that the defendant was negligent but also to prove that such negligence was the proximate cause of the injury.

“The burden rests on plaintiff not only to prove that defendant was negligent, but also that such negligence was the proximate cause of the injury.”

29 Cyc. 600.

This text is supported by a multitude of authorities to which many others might be added.

“The burden is always on the plaintiff, in an action for personal injuries, to show that the negligence charged was the proximate cause of the injury.”

St. Louis & S. F. R. Co. v. Davis, 37 Okl. 340, 132 Pac. 337.

“This fact of causal connection between an alleged negligent act or omission and an injury can no more be presumed than can the act or omission itself. *Mo. Pac. Ry. Co. v. Porter*, 73 Tex. 307, 11 S. W. 324; *T. & N. O. Ry. Co. v. Crowder*, 63 Tex. 505.”

Texas & P. Ry. Co. v. Shoemaker et al., 98 Tex. 451, 84 S. W. 1049;

Coffman v. R. Co., (Tex.) 126 S. W. 619, 620.

“It is rudimentary that negligence to be actionable must be the proximate cause of an injury, and that the burden of proof is on the plaintiff to make out such a case.”

Merrill v. Southern Ry. Co. et al., 151 No. Car. 524, 66 S. E. 570;

Pryor v. Murnane, 82 Conn. 48, 72 Atl. 571, 572.

“It is not every negligent act, no matter how gross or flagrant, that can be the subject of an action, but only such negligent acts as immediately cause an injury. This is elementary.”

Brewster v. Corporation of Elizabeth City, 142 N. C. 9, 54 S. E. 784.

The same rules as to the burden of proof are applicable whether the act be negligence *per se* because the same is a violation of some duty prescribed by ordinance, or negligence because it is violative of some duty arising under the general principles of law. So far as we have been able to find, there is no court which holds that a different rule applies in the one case than in the other.

“Although the violation of a statute is held to be negligence *per se* there must be a causal relation between such act and the injury to render defendant liable, and such violation must be the proximate cause of the injury. And in this respect it must appear that compliance with the ordinance would have prevented the injury.”

29 Cyc. 439-440.

The following is quoted from an extensive note found in 9 L. R. A. (N. S.) at pp. 338, 345:

“In case of a personal injury alleged to be the consequence of the neglect to obey a statute enacted for the protection of the victim, *the violation of the statute must be shown to have been the proximate cause of the injury; otherwise no recovery can be had.*”

This text is supported by decisions almost without number.

“In determining whether particular acts of negligence can be considered the proximate cause of injury, no distinction can properly be made between acts which constitute negligence because they are in conflict with statutory law and acts which are condemned as negligence under the general principles of law governing the conduct of men in relation to each other. *Whether the act be negligence per se, because violative of a statutory duty, or negligence because violative of some duty arising under general principles of law, the same rules must be applied in determining the question of proximate cause.*”

Missouri, K. & T. Ry. Co. of Texas v. Dobbins, (Tex. Civ. App.) 40 S. W. 861.

“It may be assumed that the cars were going at a rate of speed forbidden by the ordinance of the city, and that the rules of the company were violated in respect to signals of approach; yet it must appear, as was said in *Stebbing's Case*, 62 Md. 517, that ‘the negligent breach of the duty imposed by the ordinance was the

direct and proximate cause of the injury complained of, and that such injury would not have occurred but for the violation of that duty’.”

Cumberland & P. R. Co. v. State, 73 Md. 74, 20 Atl. 785.

“The element of proximate cause must be established, and will not be presumed from the fact that an ordinance or statute has been violated; and, even where the defendant rests under the imputation of negligence by reason of a violation of duty imposed by an ordinance or statute, *the negligence, no matter of what it consists, cannot create a right of action, unless it is the proximate cause of the injury complained of by the plaintiff.* Elliott, Roads & S., 1025, 1026.”

Chesapeake & O. Ry. Co. v. Jennings, 89 Va. 70, 34 S. E. 986.

“It seems to us that the principle is clearly settled by this court in the cases cited that while the violation of a statute is negligence, yet to entitle the plaintiff seeking to recover damages for an injury sustained, *he must show a causal connection between the injury received and the disregard of the statutory prohibition or mandate*—that the injury was the proximate cause, and this requirement is fundamental in the law of negligence.”

* * * * *

“We have found no case in which the plaintiff was not required to show that his injury was the proximate consequence of the defendant’s negligence.”

Rich v. Asheville Electric Co., 152 No. Car. 689, 68 S. E. 232.

“It is not enough, to entitle the plaintiff to damages, to show merely that the defendant was traveling in violation of the law of the road at the time of the injury. To maintain his action the plaintiff must establish two propositions: (1) That the collision was the result of the defendant’s negligence; and (2) his own inability to avoid it by the exercise of ordinary care.”

Brember v. Jones, 67 N. H. 374, 30 Atl. 411.

The following is the syllabus by the court in *Massie v. Coal Company*, 41 W. Va. 620, 24 S. E. 644:

“In an action for injury resulting from the illegal negligence of the defendant, the burden of proof is on the plaintiff, and he must show that the negligence complained of was the proximate cause of the injury.”

See also *Seibert v. McManus*, 104 La. 404, 29 So. 108;

Mankey v. Ry. Co., 14 So. Dak. 468, 85 N. W. 1013.

In *Browne v. Seigel-Cooper & Co.*, 90 Ill. App. 49, (Judgment affirmed, 60 N. E. 815, 191 Ill. 226), it was held that the mere failure to obey an ordinance was of itself insufficient to entitle plaintiff to recover for personal injuries, but that it must appear that such failure was the proximate cause of the injury.

There was no instruction given by the court that could possibly have had the effect of removing from

the jury's mind the erroneous rule of law embodied in the instructions complained of. (Record, pp. 237-252) An examination of the record upon the question of the liability of the defendant, as we have heretofore pointed out under Specification of Error No. I, indicates that the liability of defendant for the accident involved in this controversy is at least very doubtful.

Hunt and Bevington testified that the automobile was within 8 feet of the track when they were first able to see the care more than 100 feet away, while the testimony of the defendant's witnesses is to the effect that the car was not more than 60 feet away and in full view of Mr. Hunt before the automobile which admittedly could have been stopped in 12 feet had reached East Cherry Street. The evidence, therefore, on the issue of what was the proximate cause of the accident was closely contested. It follows that an instruction casting the burden upon defendant to prove that its negligence was not the proximate cause when the burden of proof was really upon the plaintiffs to establish that such negligence, if there was any, was the proximate cause, must necessarily have been highly prejudicial to the defendant.

We wish to quote the following from the case of *Schumacher v. Tuttle Press Co.*, 142 Wis. 631, 126 N. W. 46, 49, an action for personal injuries

where the lower court had by its instructions improperly placed the burden of proof as to proximate cause upon the defendant instead of the plaintiff:

“The instruction being erroneous, the next inquiry is whether it appears to have affected the substantial rights of the defendant, for, unless it does so appear, the judgment is not to be reversed on that ground. Section 3072m, St. 1898 (Laws 1909, c. 192). That it does so appear we cannot doubt. *Where a question of fact is close and doubtful, as in this case, the question of which side has the burden of proof is always of great importance.* Any one who has tried a question of fact himself upon evidence nearly evenly balanced has experienced the importance of the rule, and has frequently been compelled to decide such questions on the consideration alone that he, upon whom lay the burden of proof, had not been able to lift it. *To have this burden wrongly placed on the crucial point of a close case seems unquestionably to be the deprivation of a substantial, not a mere technical, right. We therefore reluctantly conclude that this error necessitates reversal.* *Grenawalt v. Roe*, 136 Wis. 501, 117 N. W. 1017.”

We respectfully submit that the court erred to the prejudice of defendant in instructing the jury as it did.

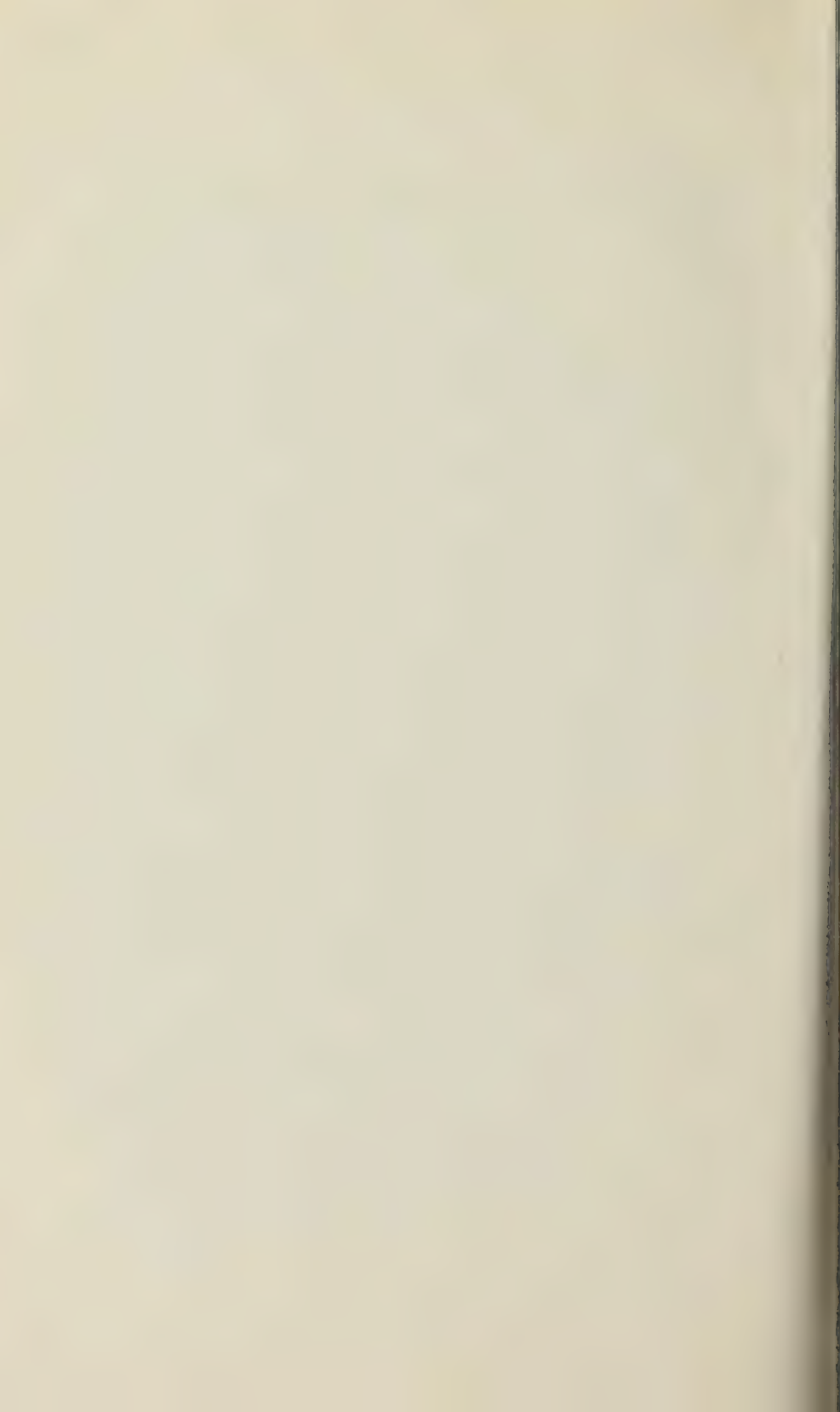
A word with respect to the plaintiffs' so-called request for a new trial which was filed two days after the issuance of the Writ of Error. (Record,

pp. 258-274) The order denying the request shows that the defendant objected to the granting of said request unless the plaintiffs would concede the trial court to be in error as to the matters and things set forth in defendant's Assignments of Error, and that *the plaintiffs refused to concede any error in the trial of the cause.* (Record, p. 260) It must be presumed, we submit, that the trial court would have made the same errors in his rulings and instructions had he granted a re-trial, that he made at the first trial. A new trial under such circumstances would have been of no benefit to defendant, for it would presumptively have resulted no more favorably to defendant than the first. The purpose of this appeal is to correct the errors which were prejudicial to defendant. A new trial will do defendant no good unless the errors are corrected.

We respectfully submit that the judgment of the lower court should be reversed and the action remanded to be re-tried in accordance with the law announced in Your Honors' decision.

JAMES B. HOWE,
A. J. FALKNOR,

Attorneys for Plaintiff in Error.



IN THE

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT

PUGET SOUND TRACTION, LIGHT
& POWER COMPANY, a Corporation

Plaintiff in Error

vs.

M. A. HUNT AND MARY A. HUNT,

Defendants in Error.

No. 2546

BRIEF OF DEFENDANTS IN ERROR.

UPON WRIT OF ERROR TO THE UNITED
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WESTERN DISTRICT OF WASH-
INGTON, NORTHERN
DIVISION

F. E. HAMMOND,
J. M. HAMMOND,
T. F. BEVINGTON,

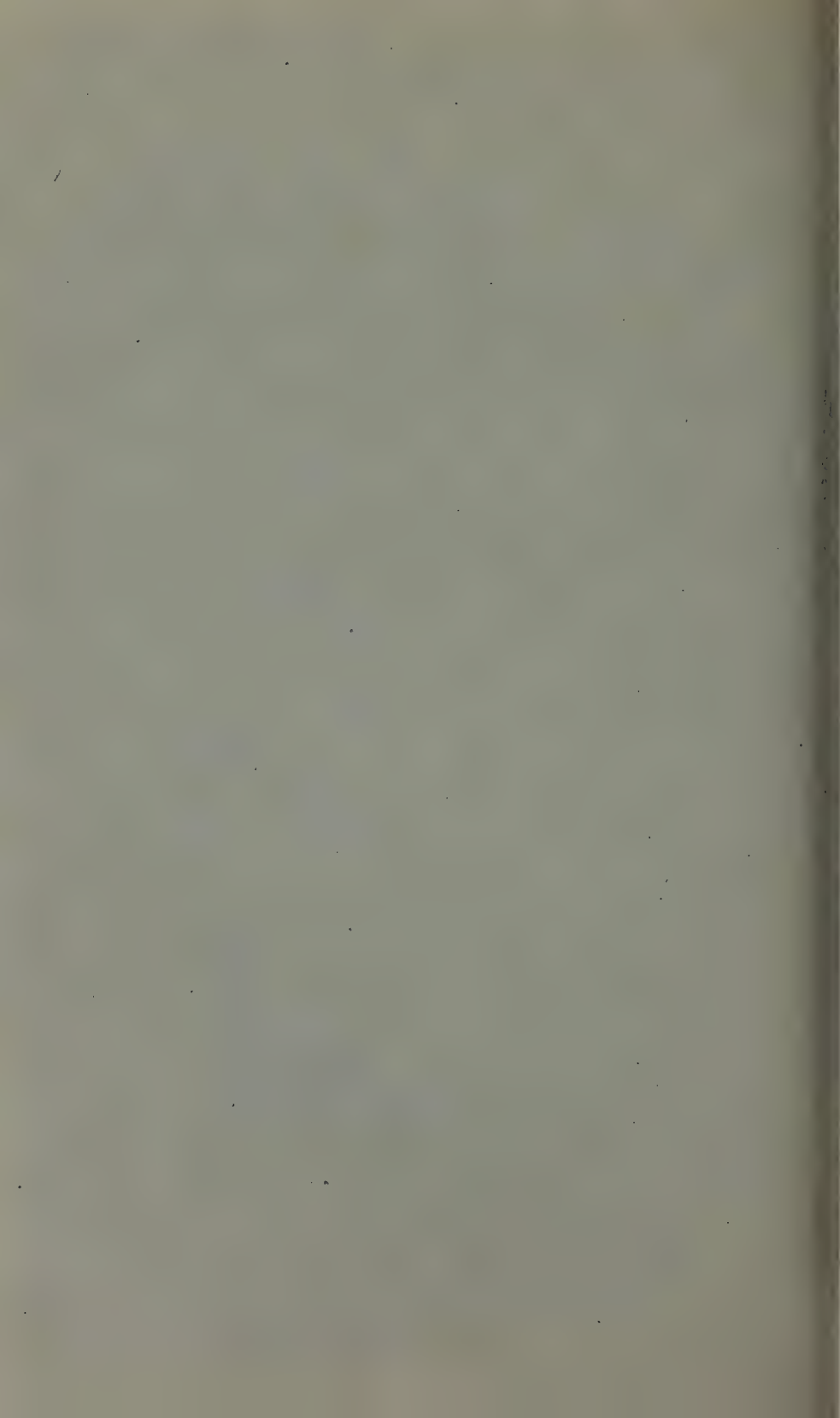
Attorneys for Defendants in Error.

602 Mutual Life Building, Seattle, Washington.

KLEMPNER & BOYCE

Filed

MAY 10 1915



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SPECIFICATION OF ERROR I.

The plaintiff in error contends that the Court
erred in overruling the defendants' challenge to the

sufficiency of the evidence to sustain a verdict for plaintiffs.

Whether or not the Court erred in overruling the defendant's challenge to the sufficiency of evidence and in refusing to instruct the jury to return a verdict for the defendant, is a legal proposition, which raises the question as to what is the duty of a trial court under the facts as established by the testimony.

The general rule is that:

"Only in the clearest cases, where the facts are undisputed and where all intelligent men can draw but one inference, is the question of contributory negligence for the Court, and especially is this true when the measure of duty is ordinary and reasonable care;"

Kett vs. Colorado & S. Ry. 146 Pac. 245 Colo.

Williams vs. Sleepy Hollow M. Co., 37 Colo. 69;
72 L. R. A. (N.S.) 1170; 86 Pac. 339.

Railroad Company vs. Van Steinburg, 17 Mich. 120.

Briggs vs. Taylor 28 Vt. 183.

Phillips vs. Denver City Tramway Co. 128 Pac. 460
(Colo.)

"Where the circumstances are such that

minds of ordinary intelligent men differ as to the question of negligence, it must be left to the jury, and it is always a question to be determined by that body when the measure of duty is ordinary and reasonable care."

Rimmer vs. Wilson, 42 Colo. 180; 93 Pac. 1110.

Phillips vs. Denver City Tramway Co. 128 Pac. 460
(Colo.)

"If the facts are disputed, the question is for the jury, and even if the facts are undisputed, but different inferences may be drawn from them, it is a question for the jury; but if the facts are not disputed and but one inference can be drawn from them by reasonable, prudent men, the question of negligence is for the Court."

Wade vs. Empire District Electric Co. 147 Pac. 63
(Kan.)

77 Wash. 564.

205 Fed. 833.

The brief of Council for the plaintiff in error seems to be predicated upon the supposition that the defendant in the lower Court was not guilty of negligence, and that the plaintiff in the Court below, was guilty of negligence, and such negligence of the said plaintiff was the proximate cause of the injury. Of

course, if the proven facts in this case established that assumption, the plaintiffs could not recover. That the defendant in the Court below was guilty of negligence is proven by the undisputed testimony of the defendants' witnesses, who testified that the speed of the street car was in excess of the limit fixed by law. The street car which caused the damage was exceeding the speed limit, both under the Ordinances of the City and the Statute of the State. That act under all the decisions, is negligence per se.

It was the contention of the defendant in the Court below, that the plaintiff, M. A. Hunt, was negligent in the operation of his automobile, and that such negligence contributed to the injury of the plaintiff and was the proximate cause thereof.

The burden of proving that the plaintiff was guilty of contributory negligence was upon the defendant, and the question as to whether or not the said plaintiff was guilty of contributory negligence was a question for the jury, in-as-much as the evidence was contradictory, the case was properly submitted to the jury for its determination, and the jury found in favor of the plaintiffs.

As stated by the Court in passing upon the motion of the plaintiff in error for a directed verdict. (p 235 Tr.)

The Court: "I was going to give you my view upon that phase. Irrespective of some other elements that might enter into the case there is some testimony here that this automobile ran up to the street-car track, right near it, and stopped and was there, and the motorman of the approaching car could see him for a sufficient distance to stop the car."

The question of the negligence of the plaintiff in the Court below, as to speed and under all the proven circumstances, was a disputed question submitted to the jury on conflicting evidence, and upon these disputed facts and the credibility of the witnesses, the jury, under proper instructions, by their verdict determined that the plaintiff was not negligent, or if negligent, that his negligence was not the proximate cause of the injury.

Counsel for plaintiff in error cites Section 2331 of Rem. & Ballinger's Code, and Statutes of Wash. (p. 35 of Brief); and urges that the defendant in error was guilty of contributory negligence, because his automobile passed from 27th Avenue North into East Cherry street at a rate of speed exceeding four miles per hour, or one mile in fifteen minutes, because of the fact that a person was standing on the side-walk on the

northwest corner of the intersection of 27th Avenue with East Cherry street.

By referring to Exhibit 1 of the defendants in error, the Court will observe that there is considerable of a jog in 27th Avenue; that is to say, 27th Avenue as it passes north from East Cherry Street, is some distance east of the point where 27th Avenue runs into east Cherry Street from the south.

The statute referred to means that, if a person were standing or walking on the crossing of 27th Avenue on the *south* side of East Cherry Street, an automobile should not be run from the south into east Cherry Street, or across said crossing at a rate of speed exceeding four miles per hour; it has no reference to a pedestrian who might be walking across the north crossing of 27th Avenue; but, if the person driving the automobile intended to proceed further north on 27th Avenue, and a pedestrian was upon the north crossing, or passing across the street on the north crossing of 27th Avenue, the automobile should not be run across that crossing at a speed in excess of four miles per hour.

The evidence in this case shows that there were no pedestrians or vehicles in the street near the intersection of 27th and East Cherry Street nor on or near

the *south crossing* of 27th Avenue, where the said 27th Avenue runs into East Cherry Street, and an automobile could pass into 27th Avenue from the south at a speed of eight miles per hour.

The defendant in error, Hunt, could not see the approaching street-car until after he had passed the apartment house and into East Cherry Street; and, after passing the apartment house obstruction and the covered delivery wagon and telephone pole obstructions and be in a position where he could see the street-car, the momentum of the automobile would, of itself, carry the automobile a few feet before he could apply the brakes.

Counsel for plaintiff in error seems to make light of the contention of the defendants in error that the covered delivery wagon or telephone pole, obstructed the view of the defendant in error, M. A. Hunt, saying, that the street-car was such a large object that the defendant in error, Hunt, should have seen it. It is within the knowledge of all men, and is a rule of optics, that a very small object near a person will prevent the seeing of a very large object some distance away; and, a person might stand so close to a very small telephone pole and, by reason of the proximity, it would obstruct his view of one-half of a City of 100,000 people, and yet, at the same time, a person

1000 feet away in a street-car could see him, unless the telephone pole entirely covered his body. This is merely by way of illustration, and illustrates the fact that while the motorman on the car might have seen and did see the automobile coming around the corner of the apartment house, the defendant in error, by reason of the obstruction of his view, would not be able to see the street-car for quite a distance away. As the defendant in error passed the corner of the apartment house, the extreme front end of the automobile, or radiator, was nine feet in advance of where the driver, Hunt, was sitting.

An examination of the cases cited by the plaintiff in error, as sustaining its contention that the defendant in error was guilty of contributory negligence, as a matter of law, will disclose the fact that there is a great difference between the cases cited by Counsel for plaintiff in error, and the case at bar.

As to the relative rights of street-cars, pedestrians and drivers of vehicles upon the streets of a City, see:

Oberstock vs. United Rys. Co. 137 Pac. 195 (Ore.)

3 *Elliott on Railroads* (2 ed.) Sec. 1093.

The defendant in the case at bar cited, amongst others, the case of:

Denver City Tramway Co. vs. Norton et al., 141 Fed. 599.

For the purpose of showing that the Company in the operation of its street-cars had a right superior to the plaintiff upon the street in the operation of its car. We hardly deem it necessary to notice this claim of the defendant, it being so inapplicable to the facts of this case. However, we call the Court's attention to the following paragraph from the same opinion:

“While the street railroad company has this preferential right of way, it has no right to proceed upon the assumption that it may take no heed of the probability of encountering, at such crossings in a city, vehicles and the like, which have the right to use the crossing as a common high-way. The motorman, in control of the operation of his car, must at all times, in approaching such crossings, proceed with such care and caution as, while subserving the public in rapid transit, he can reduce to the minimum the danger to others entitled to its contemporaneous use.”

The Court in speaking of the preferential right of way, undoubtedly is speaking of that part of the street occupied by the tracks of the company, and even that must be used as above stated by the Court. The right of way spoken of means, as we understand, the space occupied by the tracks and does not mean the right or permission to run along without heed of the

danger to others, and this right is based upon the fact that the street cars are confined to their tracks and refers more particularly to where a pedestrian or driver of a vehicle undertakes to drive along in front of and in the same direction as a street car; and under such circumstances, the street car company has a perfect right, and the driver of a vehicle has no right to thus obstruct the way; but, we submit that the case before the Court is not of that nature.

SPECIFICATION II.

We desire to call the Court's attention to the manner in which the instructions excepted to by the defendant are presented to this Court. The Court will observe by reference to the Transcript, pages 243, 244 and 245 of the Record, that the defendant has not presented to this Court the whole of the paragraphs of the instructions of the trial Court, upon which it specifies error. It will be conceded, we think, upon all hands, without the citation of authorities, that in considering instructions to a jury, by way of objections, that the instructions must be read as a whole, and we submit that the instructions of the trial Court when read as a whole are not open to the criticism of the defendant in the case.

In the same paragraph of the Court's instructions

of which defendant's Specification No. II. is a part, and which as a continuation follows the instruction complained of in defendant's brief is the following:

"An when both parties, the plaintiff and defendant, run at excessive rates of speed it is for the jury to determine the conduct or negligence of which was the proximate cause of the injury."

(p. 245 Record.)

Again, the trial Court in its instructions to the jury said:

"The fact that you may find that the automobile was driven at a greater rate of speed does not preclude recovery in this case if you should find that the rate of speed at which the automobile did cross the street there, was not the proximate cause of the injury, but that the operation of the street car was the proximate cause which resulted in the injury."

(p. 246 of Record.)

So that the Court all through his instructions to the jury, impressed upon the jury's mind that the plaintiff could not recover, if his negligence, if any, was the proximate cause of the injury, and the jury could

not have been mislead by a mere isolated phrase of the instructions.

SPECIFICATION OF ERROR NO. III.

The Court's attention is called especially to defendant's Specification of Error No. III., in which the plaintiff in error criticises the trial Court, and copies a part of the instruction to which the error refers. The instruction does not warrant the criticism.

Counsel for plaintiff in error construes the instruction to mean that, the plaintiff in the lower Court would be entitled to recover, even though his negligence was the proximate cause of the injury. That is not what the instruction complained of says. The Court in that instruction was instructing the jury upon the *burden of proof*, and said: "The burden of proof would be upon the Company to show that it was in fact not negligent * * * and that the injury occasioned was caused by the negligence of the plaintiff as the proximate cause thereof." The words omitted from the above quotation are: "even though the car was running at such excessive rate of speed." We submit that the Court correctly stated the law. When it is conceded that the street car company exceeded the speed limit, such being negligence per se, the burden of proof is upon the street car company to show

that it was in fact not negligent, and that the injury occasioned was caused, not by its negligence, but by the negligence of the plaintiff, and that the negligence of the plaintiff was the proximate cause of the injury. This instruction means that if the street car was running at an excessive rate of speed and was guilty of negligence in the first instance, which in the absence of negligence upon the part of the defendant, would have been the proximate cause of the injury, and the automobile was also running at an excessive rate of speed, then the burden of proof was upon the defendant to show that the negligence of the plaintiff was the proximate cause of the injury; in other words, it was the duty of the jury to ascertain, and by their verdict find, where the plaintiff and defendant were both guilty, whose negligence was the proximate cause of the injury.

By transposing the words: "even though the car was running at such excessive rate of speed," and placing it at the end of the instruction, as quoted by the defendant, Counsel for plaintiff in error would be unable to criticise the instruction in any manner.

At the time the plaintiff in error sought to sue out a Writ of Error to this Court, defendants in error realizing the inadequacy of the verdict, were willing that a new trial might be granted in the cause, and so

stated to the lower Court. Counsel for plaintiff in error would not make a motion for a new trial, and declined to submit to the Court any request for the corrections of any supposed errors committed by the lower Court, choosing to add many hundred dollars of costs, rather than have a new trial.

The transcript of record contains the entire stenographic report of the trial; much of the evidence submitted and taken to this Court is unnecessary, and in view of the fact that the defendants in error were willing to have a new trial granted in this cause, we submit that in case of a reversal of this cause, the costs in the case should be taxed against the plaintiff in error.

There being no error committed by the lower Court, the judgment should be affirmed.

F. E. HAMMOND,
J. M. HAMMOND,
T. F. BEVINGTON,

Attorneys for Defendants in Error.

